Supreme Court, U.S.
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No. 96-

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1996

JAMES E. GILBERT, *et al.*,
Petitioners

v.

RICHARD J. HOMAR,
Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether the suspension without pay of a public employee always, regardless of circumstances, requires a pre-suspension hearing?

LIST OF PARTIES

The petitioners are four officials of East Stroudsburg University, part of the Commonwealth of Pennsylvania's State System of Higher Education: President James E. Gilbert, Director of Human Resources Gerald Levanowitz; Police Chief David Marazas; and Vice-President Curtis English. The respondent is Richard J. Homar.

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STATEMENT OF JURISDICTION

The judgement of the Court of Appeals was filed on July 18, 1996, and this petition was filed within ninety days thereafter, on October 16, 1996. The Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment's Due Process Clause provides in relevant part that "No State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const., Art. XIV, § 1.

STATEMENT OF THE CASE

The issue in this case is whether it is ever permissible for public officials to suspend an employee without pay, before giving the employee a hearing. The Court of Appeals for the Third Circuit held that a pre-hearing suspension without pay is never permissible under the Due Process Clause, regardless of the length of the suspension, the exigency of the circumstances surrounding it, and the likelihood that it is warranted. The Court of Appeals relied on dicta from the Court's decision in *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985), while acknowledging that the Court has never directly addressed this issue, and that the courts of appeals are deeply divided over it. The Court should therefore take this opportunity to resolve the issue, which is important to the day-to-day functioning of government at all levels.

1. This case arises from the attempts of state university officials to discipline one of the university's police officers after he was arrested and charged with drug-related offenses. The petitioners are four officials of East Stroudsburg University, part of Pennsylvania's State System of Higher Education: President James E. Gilbert; Director of Human Resources Gerald Levanowitz; Police Chief David Marazas; and Vice-President Curtis English. The respondent is Richard J. Homar, formerly a member of the University's police force who is now employed by the University as a groundskeeper.

On August 26, 1992, members of the Pennsylvania State Police arrested Homar during a drug raid at the home of a friend. Pet. App. 49a. The State Police charged Homar with possession of marijuana, possession with intent to deliver, and criminal conspiracy, a felony. *Ibid.* The State Police informed Chief Marazas, Homar's supervisor, of Homar's arrest and the charges against him, *ibid*; and Marazas in turn told Human

Resources Director Levanowitz, to whom President Gilbert had delegated authority to discipline and suspend university employees. Pet. App. 50a. Levanowitz decided to suspend Homar without pay. *Ibid.*

Homar did not report to work that day. The next day, however, he called Chief Marazas, told him that he had been arrested, and asked whether he was suspended. *Ibid.* Marazas told him that he was, and later that day delivered to Homar a letter from Levanowitz. The letter confirmed that Homar was suspended pending further investigation, and explained that the University's final decision in the matter would not necessarily coincide with disposition of the criminal charges against him. *Ibid.*

About three weeks later, on September 18, Levanowitz and Marazas met with Homar and his union representative. Pet. App. 54a. In the meantime, the criminal charges against Homar had been dismissed, Pet. App. 52a, and Levanowitz had met with the State Police and obtained an investigative report from them. Pet. App. 52a-53a. Levanowitz told Homar that he had completed his investigation and that he had received some "very serious" evidence about Homar from the State Police. Pet. App. 54a. He invited Homar to give his account of what occurred on the day of his arrest and Homar did so. *Ibid.* By letter dated September 23, Levanowitz demoted Homar to the position of groundskeeper. Pet. App. 54a. He was, however, given back pay for the period of his suspension at his former pay rate.[1] Pet. App. 55a.

The next day, Homar and his union representative met with President Gilbert. Pet. App. 56a-57a. Gilbert gave Homar an opportunity to respond to the charges and to Levanowitz's decision, Pet. App. 57a, but sustained

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[1]Homar was initially given back pay only at the lower rate paid to a groundskeeper, but this was later increased to the higher rate. Pet. App. 55a.

Levanowitz' decision the same day. *Ibid.*

2. Homar brought this action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Middle District of Pennsylvania, seeking damages and reinstatement to his former position. All of Homar's claims arose under the Fourteenth Amendment's Due Process Clause. As relevant here, Homar claimed that the petitioners' failure to give him a hearing before suspending him violated his right to procedural due process.[2]

The District Court rejected all of Homar's claims and granted the petitioners' motion for summary judgment. As to Homar's suspension without pay, the District Court applied the balancing test from *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982). The District Court recognized that Homar had a strong private interest in continuing to receive his salary, but also held that the University had a compelling interest in preserving public confidence in law enforcement; and that under the circumstances, the likelihood of governmental error was slim. Taking all these interests into account, and considering also that the deprivation suffered by Homar was both temporary and brief, the District Court held that postponing the hearing on Homar's suspension did not violate the Due Process Clause. Pet. App. 58a-63a.

3. A divided panel of the Court of Appeals reversed the

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[2]Homar also claimed that the hearing given to him before his demotion was procedurally inadequate; that his suspension and demotion violated his right to substantive as well as procedural due process; and that the petitioners had deprived him of protected liberty, as well as property, interests. Pet. App. 63a-73a. None of these claims is before the Court.

District Court's decision on the suspension without pay issue.[3] Pet. App. 7a-17a. The majority agreed with the District Court that

> there was a compelling governmental interest which supports [the university's] decision to suspend Homar immediately and without a hearing pending further investigation. The university has a substantial interest in maintaining public confidence in [its] police force, and Homar's arrest on drug charges certainly suffices to ensure that the university' s concerns were not baseless or unwarranted ....

Pet. App. 11a. Nevertheless, the majority held that the petitioners had violated Homar's due process rights "because he was suspended *without pay*." *Ibid* (emphasis in original).

The panel majority relied primarily on dicta from the Court's decision in *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985). In *Loudermill*, the Court discussed the possibility that a public employer might need to remove an employee immediately without hearing, and suggested that "in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem *by suspending with pay*." *Id.*, at 544-45, *quoted at* Pet. App. 11a (emphasis added by the Court of Appeals). This, in the view of the panel majority, "strongly suggests that suspension without pay must be preceded by notice and an opportunity to be heard *in all instances*." *Ibid* (emphasis added).

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[3]On Homar's other claims, the Court of Appeals reversed the District Court's decision on the adequacy of the hearing given to Homar before his demotion, and on his substantive due process claim; but affirmed the District Court on his liberty interest claim. Pet. App. 17a-27a.

The majority recognized that at least two other courts of appeals had considered the same language from *Loudermill* and had reached the contrary conclusion. Pet. App. 12a & n. 12, *citing Engdahl v. Dept. of Navy*, 900 F.2d 1572 (Fed. Cir. 1990) *and Bailey v. Board of County Com'rs of Alachua County*, 956 F.2d 1112 (11th Cir. 1992). They nevertheless held that "a governmental employer may not suspend an employee without pay unless that suspension is preceded by some kind of pre-suspension hearing." Pet. App. 14a.

Judge Alito dissented from the majority's "blanket rule," Pet. App. 31a. Judge Alito relied on the Court's recognition in *Loudermill* that "[t]here are, of course, some situations in which a postdeprivation hearing will satisfy due process requirements," Pet. App. 31a, *quoting Loudermill*, 470 U.S. at 542 n.7, and on the Court's observation in *FDIC v. Mallen*, 486 U.S. 230 (1988), that

> [a]n important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation.

Id, at 240, *quoted at* Pet. App. 29a. He would have applied the balancing test of *Logan* and other cases, and would have held that under circumstances such as those presented by this case, there is no requirement that a public employer must pay its suspended employees. Pet. App. 30a. As to the dicta from *Loudermill* relied on by the majority, Judge Alito agreed with the *Engdahl* court that the Court's language in *Loudermill*

> is merely descriptive, not normative. We agree that in the instant case, the government could

> have suspended with pay. Nevertheless, we cannot read *Loudermill* as holding that the government must suspend him with pay.

Pet. App. 31a, *quoting Engdahl*, 900 F.2d at 1578.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS FROM FIVE OTHER CIRCUITS.

The Third Circuit recognized that its *per se* rule that "suspension without pay must be preceded by notice and an opportunity to be heard *in all instances*," Pet. App. 11a (emphasis added), conflicts with the decisions of at least two other courts of appeals. Pet. App. 12a. In both *Engdahl v. Dept. of Navy*, 900 F.2d 1572 (Fed. Cir. 1990) and *Bailey v. Board of County Com'rs of Alachua County*, 956 F.2d 1112 (11th Cir. 1992), the courts squarely considered the same language from *Loudermill* relied on by the Third Circuit, but concluded that the Court did not by that language mean to impose a blanket rule against pre-hearing suspensions without pay. *Engdahl*, 900 F.2d at 1578; *Bailey*, 956 F.2d at 1124 n. 13.[4]

In addition, at least three other circuits have discussed *Loudermill*, although not the precise language relied on by the Third Circuit, in decisions upholding the constitutionality of pre-hearing suspensions without pay. *See Jones v. City of Gary, Ind.*, 57 F.3d 1435, 1441 (7th Cir. 1995); *Ambus v. Granite Bd. Of Education*, 975 F.2d 1555, 1562 (10th Cir. 1992); *Strong v. Bd. of Ed. of Uniondale Union Free Sch. Dist.*, 902 F.2d 208, 211 (2d. Cir. 1990). None of these decisions can be reconciled with the Third Circuit's holding in this case. The Court should review this case in order to resolve this conflict.

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[4]As the Third Circuit pointed out, Pet. App. 11a-12a & n. 12, an earlier decision of the Eleventh Circuit agreed with its reading of *Loudermill*. *See Everett v. Napper*, 833 F.2d 1507 (11th Cir. 1987).

II. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT.

The Third Circuit's *per se* rule against pre-hearing suspensions without pay is inconsistent with the flexible analysis which has long been the hallmark of the Court's procedural due process jurisprudence. The Court has long emphasized

> the truism that due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.... [D]ue process is flexible and calls for such procedural protections as the particular situation demands.

Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (citations and internal quotation marks omitted). The Court has consistently held that the Due Process Clause requires, in each case, a particularized balancing of the private and governmental interests at stake, the need to avoid administrative burdens and the probable value of additional safeguards, and the risk of an erroneous deprivation. *See, e.g., Loudermill*, 470 U.S. at 542-43; *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982).

Most importantly for this case, the Court has repeatedly rejected the idea that due process "always requires the State to provide a hearing prior to the initial deprivation of property." *Parratt v. Taylor*, 451 U.S. 527, 540 (1981), *overruled in part on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986). Rather, "there are ... some situations in which a post-deprivation hearing will satisfy due process requirements."

Loudermill, 470 US. at 542 n. 7. Even in employment cases,

> [a]n important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation.

FDIC v. Mallen, 486 U.S. 230, 240 (1988).

The Third Circuit's imposition of a blanket rule to govern all cases of suspension without pay simply cannot be squared with this well-settled analysis. The Court should review this case to correct this error, and to resolve the tension which the Third Circuit perceived to exist between the Court's dicta in *Loudermill* and its holdings in *Mallen* and the other cases cited above.

III. THE ISSUE PRESENTED BY THIS CASE IS IMPORTANT TO PUBLIC EMPLOYERS AT ALL LEVELS OF GOVERNMENT.

As the cases cited in this petition and in the decisions below illustrate, governments at all levels are frequently faced with the urgent need for prompt action to protect the public confidence, and even the public safety, when public employees are charged with criminal or other wrongdoing. *See, e.g., Engdahl v. Dept. of Navy*, *supra* (naval employee charged with sexual offenses against child); *Bailey v. Board of County Com'rs of Alachua County*, *supra* (prison guard arrested for collusion in escape); *Ambus v. Granite Bd. Of Education*, *supra* (teacher arrested on drug charges). When these situations arise, it is important that officials know what they may and may not do, consistent with the Constitution, to

protect the public. The Court should review this case to provide that guidance.

CONCLUSION

For these reasons, the Court should grant the petition for the writ of certiorari and, upon review, reverse the judgment of the Court of Appeals on the respondent's suspension-without-pay claim.

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October 16, 1996

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-7218

Richard J. HOMAR,
Appellant

v.

JAMES E. GILBERT, Individually, and in his capacity as Pres. of E.S. Univ.; GERALD LEVANOWITZ, Individually, and in his capacity as director of Human Res. at E.S. Univ.; DAVID MARAZAS, Individually, and in his capacity as Police Chief of E.S. Univ.; CURTIS ENGLISH, Individually, and in his capacity as V.P. of E.S. Univ.

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 93-cv-0852)

Submitted Under Third Circuit LAR 34.1(a)
Thursday, November 2, 1995

Before: NYGAARD, ALITO, and SAROKIN,
Circuit Judges

(Filed July 18, 1995)

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OPINION OF THE COURT

SAROKIN, *Circuit Judge.*

Plaintiff Richard Homar was suspended without pay from his position as a police officer at East Stroudsburg University after his arrest on drug-related charges. The criminal charges against Homar were eventually dismissed, but Homar was nonetheless subsequently demoted to the position of groundskeeper. Homar filed suit in federal district court seeking reinstatement, backpay and damages for violations of his due process rights. The district court entered summary judgment in favor of defendants. Plaintiff appeals.

Although we conclude that these circumstances warranted and justified an immediate suspension of employment without a hearing, the added suspension of pay necessitated a hearing. Furthermore, the subsequent restoration of that pay cannot serve to cure the due process violation. It may serve to reduce the damages to which the employee may be entitled, but the deprivation must be viewed at the time of its occurrence, not as belatedly corrected by later action; otherwise employers could violate the due process rights of their employees and simply cure those violations through the means of retroactive pay.

We also hold that once suspended, an employee is entitled to a hearing before any further action is taken to

demote, terminate, or extend his suspension. At such a hearing, the employee is entitled to know the evidence against him and be afforded the opportunity for a meaningful response. We conclude that there is a genuine issue of material fact as to whether such a hearing was afforded here, and we thus reverse the order of summary judgment.

I.

Plaintiff Richard Homar was employed as a police officer at East Stroudsburg University ("ESU"). On August 26, 1992, Homar was arrested when a drug raid took place at the home of his friend, James Crompton, whom he was visiting. That same day, the Pennsylvania State Police filed a criminal complaint against Homar charging him with possession of marijuana, possession with intent to deliver and criminal conspiracy.

The state police called David Marazas, ESU's police chief and Homar's supervisor, to inform him of Homar's arrest and the charges against him. Marazas then informed Gerald Levanowitz, ESU's Director of Human Resources, to whom ESU President James Gilbert had delegated authority to discipline and suspend ESU employees. Levanowitz decided immediately to suspend Homar without pay. No pre-suspension hearing was held.

On August 27, Homar received a letter from Levanowitz advising him that he was suspended without pay pending further investigation and disposition of the criminal charges. The letter advised Homar that any administrative action taken by the University against him "[did] not have to coincide with the disposition of those charges through the legal process." Appendix ("App.") at 197.

District Justice Charles P. Eyer dismissed all criminal charges against Homar on September 1, 1992. Levanowitz still refused to lift Homar's suspension.

On September 11, 1992, Levanowitz, along with two ESU police sergeants who were assigned to conduct an investigation on Homar, met with two state troopers and a Corporal to discuss Homar's situation. App. at 143. One of the troopers was the state trooper who signed the criminal complaint against Homar. At this meeting, Levanowitz was provided with a copy of a page from the Pennsylvania State Police investigative file regarding Homar, called the "Supplemental Report." This report includes statements attributed to Homar that he allegedly made to the Pennsylvania State Police when he was interviewed shortly after his arrest. According to the Supplemental Report, Homar admitted his knowledge of drug dealing by Crompton and another man named Habhab, and Homar further admitted that he had received marijuana from Habhab for his own use while he was employed as an ESU police officer. Homar contests that he ever made these statements.

On September 15, 1992, Levanowitz called Homar and arranged for a meeting three days later. Levanowitz explained that this meeting would be an "administrative hearing," and that accordingly Homar had a right to have his union representative present but that he did not have a right to legal counsel.

Homar attended this meeting on September 18, 1992, along with his union representative. Besides Levanowitz, Marazas was also present, as well as Levanowitz's secretary. At the start of the meeting, Homar's union representative requested that Homar's attorney be present. Levanowitz responded that if Homar so chose, they would have to postpone the meeting until a later time. Homar opted to proceed with the meeting unrepresented. According to the notes taken by

Levanowitz's secretary, Levanowitz made the following statement to Homar:

> The purpose of this meeting today is to give you an opportunity to provide any information on your own behalf that would assist us in making a determination concerning the action that would end your suspension and any information that would be of help to you in presenting your case.

App. at 205.

Levanowitz maintained at a deposition held later that he had told Homar that "the State Police had given [him] some evidence very serious in nature," App. at 164, and that he offered Homar the opportunity to present his side of the story. Levanowitz never informed Homar that he had received the Supplemental Report from the state police containing his alleged confession.

On September 23, 1992, Levanowitz wrote a letter to Homar advising him that he was being demoted from the position of police officer to the position of groundskeeper. The text of the letter reads, in pertinent part, as follows:

> This is to inform you that you are to be demoted from your position as a Police Officer I in the Campus Police Department to the position of Groundskeeper ... . The action is effective retroactive to August 26, 1992, and you are to be given back pay to that date at the rate of pay for a Groundskeeper. You are to report to work at 7:00 A.M. on September 24, 1992 at the Facilities Management Office. Your new rate of

> pay as Groundskeeper will be $552.80 bi-weekly.[1]
>
> This action is being taken as a result of admissions made by yourself to the Pennsylvania State Police on August 26, 1992 that you maintained association with individuals whom you knew were dealing in large quantities of marijuana and you obtained marijuana from one of those individuals for your own use. Your actions constitute a clear and flagrant violation of Sections 200 and 200.2 of the East Stroudsburg University Police Department Manual.

App. at 208 (footnote added).

After this letter was issued, the president of the union representing Homar requested that Homar have an opportunity to meet with President Gilbert regarding the letter. The meeting occurred on September 24, 1992 at 2:00 p.m. By this time, Homar had received and read a copy of the Supplemental Report. Gilbert provided Homar with an opportunity to respond to the charges and to Levanowitz's decision. Gilbert nonetheless sustained the suspension.

After failing to obtain relief through his union grievance procedure, Homar filed a complaint in the district court for the Middle District of Pennsylvania against Gilbert, Levanowitz and Marazas. His complaint alleges that the procedures by which he was suspended and then demoted lacked required due

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[1]On February 16, 1993, Levanowitz directed retroactive payment to Homar of the difference in groundskeeper salary and police officer's salary for the period of his suspension.

process, that defendants' actions deprived him of liberty and property, and that his substantive due process rights were also violated. The district court entered summary judgment in favor of the defendants on March 17, 1995. Homar then appealed to this court.

II.

The district court had jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343 and 42 U.S.C. § 1983. This court has jurisdiction over the appeal of the district court's final decision under 28 U.S.C. § 1291.

Our review of the district court's order for summary judgment is plenary, and we thus apply the same standards that were applicable in the district court. *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1530 (3d Cir., 1990), *cert. denied*, 499 U.S. 921 (1991). Summary judgment is appropriately granted when "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). If, however, "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), summary judgment shall not be granted. Homar, as the nonmoving party, is entitled to have all reasonable inferences drawn in his favor. *See J.F. Feeser*, 909 F.2d at 1531.

III.

Homar's first claim is that ESU failed to provide him a meaningful pre-deprivation hearing prior to his suspension without pay and his subsequent demotion from police officer to groundskeeper.

In *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985), the United States Supreme Court held that when a public employee has a property interest in his or her employment he or she is entitled to a meaningful pre-termination hearing. Such a hearing need not be elaborate, but rather "an initial check against mistaken decision--essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Id.* at 545-46. *Loudermill* specifically requires that prior to termination:

> [a] tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.

Id. at 546.

The Supreme Court has made it eminently clear that due process entitles a party to such a hearing "*before* he [or she] is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971); *see also Loudermill*, 470 U.S. at 542; *Bell v. Burson*, 402 U.S. 535, 542 (1971). This fundamental right to a pre-deprivation hearing is not abridged by the availability of extensive post-deprivation remedies. *See Morton v. Beyer*, 822 F.2d 364, 368 (3d Cir.1987) (holding that "the availability of extensive post-termination procedures does not eliminate the essential requirement of due process that a hearing be provided before discharge"); *Gniotek v. City of Philadelphia*, 808 F.2d 241, 243 (3d Cir.1986) (noting that "[t]he predeprivation hearing need not be elaborate, but it is necessary, even if

extensive post-deprivation remedies are afforded."), *cert. denied*, 481 U.S. 1050 (1987).

While we recognize that Homar was not completely terminated from his employment with ESU, he was terminated from his position as a police officer and received a reduction in his pay. Accordingly, we find the requirements of *Loudermill* to be applicable in this instance. Indeed, there is no dispute among the parties that Homar had a property interest in his employment as police officer. Rather, the dispute concerns the degree of due process to which Homar was entitled prior to his suspension without pay and prior to his demotion from his position as police officer to groundskeeper.

A.

We will first address Homar's contention that he was entitled to notice and an opportunity to be heard prior to his suspension without pay from his position as an ESU police officer.

It is undisputed that Homar was not afforded any kind of hearing prior to his suspension without pay immediately following his arrest on drug charges. ESU nonetheless argues that Homar's due process rights were not violated because, while Homar's interest in remaining in his job is "an important one," ESU had a compelling interest in "taking prompt action to maintain public confidence in its police force." Appellee's Brief at 15. Indeed, the Supreme Court has explained that

> [a]n important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation.

FDIC v. Mallen, 486 U.S. 230, 240 (1988); *see also Boddie*, 401 U.S. at 379 (noting that there can be "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event").

The district court agreed with ESU, finding that it was permissible for the university to suspend Homar without pay and without a hearing. The court first noted that "[b]oth the timing and the nature of requisite process depends upon an 'appropriate accommodation of the competing interests involved.' " *Homar v. Gilbert*, No. CV-93-0853, typescript at 11 (M.D.Pa., March 17, 1995) (hereinafter "D. Ct. Op.") (citing *Goss v. Lopez*, 419 U.S. 565, 579 (1975)). It then applied the analysis prescribed by *Logan v. Zimmerman Brush Co.*, assessing the competing interests involved, including "the importance of the private interest, and the length and finality of the deprivation, ... the likelihood of governmental error, ... and the magnitude of the governmental interests involved." *Id.*, typescript at 11 (quoting *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982)). While the district court recognized that Homar's "private interest was strong," it found that "the deprivation incident to a suspension was only temporary and of a relatively brief duration (approximately one month)." *Id.*, typescript at 11. The district court concluded that Homar's interest in avoiding such a "temporary" and "brief" deprivation was not as compelling as "the governmental interest in preserving public confidence in law enforcement." *Id.*, typescript at 12. The court found its conclusion bolstered by the fact that Homar was eventually awarded full pay and benefits for the period of suspension, noting that " '[s]uspension with pay does not raise due process concerns.' " *Id.*, typescript at 13 (quoting *Hicks v. City of Watonga, Okl.*, 942 F.2d 737, 746 n. 4 (10th Cir.1991).

We agree with the district court that there was a compelling governmental interest which supports ESU's decision to suspend Homar immediately and without a hearing pending further investigation. The university has a substantial interest in maintaining public confidence in the ESU police force, and Homar's arrest on drug charges certainly suffices to ensure that the university's concerns were not baseless or unwarranted, as required by the Supreme Court. *See Mallen*, 486 U.S. at 240. In circumstances where public safety is implicated, "[n]ot even an informal hearing ... must precede a deprivation." *Caine v. Hardy*, 943 F.2d 1406, 1412 (5th Cir.1991) (en banc), *cert. denied*, 503 U.S. 936 (1992).

Nonetheless, we find that Homar's due process rights were violated because he was suspended *without pay*. The Supreme Court's decision in *Loudermill* strongly suggests that suspension without pay must be preceded by notice and an opportunity to be heard in all instances. Initially, the Court noted that it had "frequently recognized the severity of depriving a person of the means of livelihood." *Loudermill*, 470 U.S. at 543. Then the Court explained that, while it recognized that there were some limited instances in which a strong governmental interest might warrant immediately removing a person from a position without a hearing, "in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem *by suspending with pay*." *Id.* at 544-45 (emphasis added).

Other circuits which have examined this language in *Loudermill* have disagreed with regard to its precise mandate. At least one court of appeals has read *Loudermill* to require that an employee be provided an opportunity to be heard prior to suspension without pay. *See Everett v. Napper*, 833 F.2d 1507, 1512 (11th Cir.1987) (holding that, under *Loudermill* a suspended firefighter was entitled to a hearing prior to

suspension because he was not paid during his suspension). The Federal Circuit, by contrast, noted that *Loudermill 's* prescription of suspension with pay in situations where significant hazards would result from continued employment was only dicta: "We agree that in the instant case, the government *could* have suspended with pay. Nevertheless, we cannot read *Loudermill* as holding the government *must* suspend ... *with pay*." *Engdahl v. Dept. of Navy*, 900 F.2d 1572, 1578 (Fed.Cir.1990). Other circuits, while not explicitly addressing *Loudermill*, have on occasion allowed suspension without pay to stand even in the absence of a pre-deprivation hearing. *See, e.g., Jones v. City of Gary, Ind.*, 57 F.3d 1435, 1436 (7th Cir.1995); *Ambus v. Granite Bd. of Educ.*, 975 F.2d 1555, 1558, 1562 (10th Cir.1992), *modified on rehearing by*, 995 F.2d 992 (10th Cir.1993) (en banc).[2]

This court has not precisely addressed this issue in the past. However, our decision in *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064 (3d Cir.1990), may be read to imply that, under *Loudermill,* suspension without a pre-deprivation hearing is only constitutional if the suspension is one with pay.

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[2]In disagreeing with our conclusion that *Loudermill* suggests that a state employer may not suspend an employee without pay absent a pre-suspension hearing, the dissent lists several additional cases that it contends interpret the language in *Loudermill* differently. Dissent, at 26-28. Only *Engdahl* and *Bailey v. Board of County Com'rs of Alachua County*, 956 F.2d 1112, 1124 n. 13 (11th Cir.1992) actually squarely consider the *Loudermill* language, however, and the Eleventh Circuit in *Bailey* failed to acknowledge its previous contrary precedent in *Everett*. The remainder simply allow suspensions without pay and without a pre-deprivation hearing to stand without discussing whether *Loudermill* anticipates that such a practice should be permitted. In the absence of such discussions, we do not think these decisions can be characterized as reaching any conclusion one way or the other about the *Loudermill* language. Furthermore, we do not think that *Mallen* can be read to undermine the message of *Loudermill*, as it includes no discussion of suspension with pay versus suspension without pay; indeed, the opinion does not disclose whether the bank president there was suspended with pay or without pay.

In *Bradley*, we were called upon to decide, among other issues, whether a teacher who had been effectively suspended without pay and without a hearing for one year prior to being officially terminated, had been deprived of his procedural due process rights. The employer in *Bradley* ultimately provided Bradley full sabbatical pay for the year in question. The district court had relied upon *Loudermill* to conclude that the employer was entitled to suspend Bradley without a pre-suspension hearing because he eventually had been provided payment for the period of suspension. *Id.* at 1077. In reviewing this decision, we first acknowledged that under *Loudermill,* in circumstances where a governmental employer perceives substantial hazards in keeping an employee on the job, it may suspend the employee with pay until such time that a hearing may be held. *Id.* (citing *Loudermill*, 470 U.S. at 544-45). We concluded, however, that "*Loudermill* [did] not govern [that] case because Bradley was suspended *without* pay." *Id.* We thus implicitly, but necessarily, rejected the idea that a government employer could cite to the substantial hazards of keeping an employee on the job and thereby suspend him without a pre-suspension hearing *without* pay. Had we determined that Bradley had been suspended *with* pay, we presumably would have found that the *Loudermill* exception--essentially the *Mallen* exception--applied. Thus, while *Bradley* does not explicitly declare that suspension without pay and without a pre-suspension hearing always violates due process, such a holding may be inferred from its reasoning.[3]

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[3]As the dissent points out, later in the *Bradley* opinion, we did expressly reserve decision on whether Bradley was entitled to a pre- or post-suspension hearing, noting that Bradley was not provided any hearing whatsoever. The discussion as written in *Bradley* does suggest that, had Bradley been provided a post-suspension hearing, the court envisioned that it might have found a post-suspension hearing was adequate under *Mallen*. However, we did not consider the question in any detail. Had we done so, we would have realized that a conclusion that a post-suspension hearing was sufficient would be inconsistent

Today we clearly enunciate that a governmental employer may not suspend an employee without pay unless that suspension is preceded by some kind of pre-suspension hearing, providing the employee with notice and an opportunity to be heard. We think that such a holding is not only consistent with, and suggested by, *Loudermill*, but it is also eminently sensible. It is imperative that employers be provided with adequate flexibility to allow them to protect the public and respond to emergency situations expediently. Suspension with pay addresses these important concerns while simultaneously protecting the fundamental rights of an employee to due process prior to being deprived of his or her property interest in employment and its accompanying salary.[4] Furthermore, this conclusion seems consistent with the Supreme Court's holding in *Zimmerman Brush* that, in determining the timing and nature of an appropriate hearing, courts should assess the competing interests involved and arrive at an appropriate accommodation. *Zimmerman Brush*, 455 U.S. at 434.[5]

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with our earlier conclusion that the *Loudermill* exception could not apply because Bradley was suspended without pay.

[4]The dissent questions the purpose a pre-deprivation hearing would have served in Homar's case, given that he had been arrested, admitted as much, and even anticipated being suspended. Dissent, 25 & n.1, 28-30. We think, however, that a pre-suspension hearing may have allowed Homar an important opportunity to present his side of the story, and deny any wrong-doing. While we anticipate that ESU probably would have decided to suspend Homar pending further exploration of the charges against him, had Homar had an opportunity to present his story, ESU may have decided to limit the scope of the suspension by, for example, not suspending his pay pending the investigation. Thus, although Homar may have been well aware of the reasons for his suspension, when ESU deprived him of a pre-deprivation hearing, he nonetheless was denied a meaningful opportunity to respond to the charges.

[5]The dissent properly places much emphasis on the importance of courts balancing competing interests and considering the particular circumstances of each case in determining the procedural due process requirements *See* Dissent, at 28. However, the dissent does not explain why, in order to maintain public confidence

As noted above, the district court treated Homar's suspension as a suspension with pay:

> That Homar was originally suspended without pay does not warrant a finding that he was deprived of property without due process. At most, he was denied use of his salary for a very brief period of time. To recognize a cause of action for denial of due process under these circumstances would clearly elevate form over substance.
>
> * * *
>
> Since he clearly could be suspended with pay without implicating due process concerns, and within one month after being suspended he was awarded full pay for the period of suspension, any injury resulting from the failure to provide an opportunity to be heard before the suspension was imposed is surely *de minimis*.

D. Ct. Op., typescript at 13-14.

We fundamentally disagree with the district court's conclusion. First, our decision in *Bradley* clearly indicates that the subsequent awarding of backpay does not remedy a due process violation:

> The right to procedural due process cannot be so ephemeral that it evaporates because an individual suspended without pay happened to obtain paid leave

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in the police department and to protect public safety, it is necessary that a ESU not only suspend Homar from acting as a police officer, but also deprive him of his salary. As noted above, we think that the substantial governmental interests implicated in this case are protected by allowing ESU to immediately suspend Homar without a pre-deprivation hearing, but with pay.

> thereafter.... That may affect the damages ultimately awarded, but if there was a violation of due process, [the employee] is entitled to have that right vindicated.

Bradley, 913 F.2d at 1077.

Second, Homar's suspension without pay cannot be viewed as *de minimis*. At the time that Homar was suspended, he was told that he was "to be suspended without pay, effective immediately on 8/26/92, from [his] position as a police officer at East Stroudsburg University." App. at 197. For a period of approximately one month, Homar's very livelihood was threatened because he received no salary. As far as Homar knew at the time of his suspension, he had no prospects whatsoever of receiving any wages for the indefinite duration of his suspension. It was not until he received his letter of demotion on September 24, 1992--nearly a month after he was suspended--that he learned he would be receiving backpay at the rate of a groundskeeper. While it is true that Homar eventually received backpay at the wage rate he earned as a police officer to cover the period of his suspension, we note that according to Defendant's Statement of Material Fact accompanying their Motion for Summary Judgment, Levanowitz did not authorize Homar's backpay at the rate of a police officer until February 16, 1993. Thus, for nearly six months, Homar was deprived of a salary that was rightfully his. Furthermore, there is evidence to suggest that ESU only agreed to pay this rate upon pressure from Homar's union representative.[6]

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[6]That ESU ultimately provided Homar backpay at the rate of a police officer for this period of his suspension is an indication that ESU was aware that it had erroneously deprived Homar of his salary.

Accordingly, we find that Homar was entitled to notice and at least some kind of hearing prior to being suspended without pay.[7] It is undisputed that Homar received no hearing prior to his suspension, and we conclude that the district court erred in granting summary judgment in favor of defendants on this issue.

B.

Homar further alleges that he was deprived of meaningful pre-termination due process in the course of his demotion to the position of groundskeeper.

As outlined above, *Loudermill* requires that a public employee with a property interest in his or her employment be granted a meaningful pre-termination hearing. *Loudermill*, 470 U.S. at 545-46. We reiterate that it is of paramount importance that this hearing take place prior to the deprivation. As explained above, absent compelling government interests justifying postponement of a hearing, the hearing must take place before the deprivation, *see Boddie,* 401 U.S. at 379; *Loudermill*, 470 U.S. at 542; *Bell*, 402 U.S. at 542, because "the only meaningful opportunity to invoke the discretion of the

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[7]The dissent contends that our reasoning is flawed because a public employer may suspend an employee for cause, with pay, without implicating any constitutionally protected property interest. Dissent 30. While the Tenth Circuit has squarely held suspension with pay does not implicate due process concerns, *see Hicks*, 942 F.2d at 746 n. 4, we are less sure that such is the case. While a salary is probably the most obvious property interest in employment, we think there are clearly other interests involved. In Homar's case they would include his interest in participating in the daily affairs of the ESU community as a police officer, along with his interest in the honor and respect that accompanies the post. *Cf. Mallen,* 486 U.S. at 240 (noting that a bank president's interest in the right "to continue to serve as president of the bank and *to participate in the conduct of its affairs* is a property right protected by the Fifth Amendment Due Process Clause") (emphasis added).

decisionmaker is likely to be before the termination takes effect." *Id.; see also, Board of Regents v. Roth*, 408 U.S. 564, 570 n. 7 (1972). Indeed, this right to pre-deprivation due process is so fundamental that it remains "even if extensive post-deprivation remedies are afforded." *Gniotek*, 808 F.2d at 243; *see also Morton*, 822 F.2d at 368.

This pre-deprivation hearing need not be elaborate. As explained by the Supreme Court, " 'something less' than a full evidentiary hearing is sufficient prior to adverse administrative action." *Loudermill*, 470 U.S. at 545 (citations omitted). Nonetheless, the hearing must be sufficient to inform the employee of the evidence against him or her and to respond to the evidence. *See Fraternal Order of Police Lodge No. 5 v. Tucker*, 868 F.2d 74, 80 (3d Cir.1989). "[A] *sina* [sic] *qua non* of a meaningful hearing is a sufficient explanation of the employer's evidence to permit a meaningful response." *Id.*

Under the circumstances presented here, where Homar was suspended from his position pending further investigation into his activities, it is clear that there was no compelling government issue at stake that would require ESU to immediately deprive Homar of his employment. Any concerns about preserving public safety or the integrity of the police force were met by Homar's suspension. The university thus was afforded the time it would need adequately to provide Homar a pre-deprivation hearing. The question for us to answer, then, is whether the university provided him such a hearing.

The district court concluded that the "administrative hearing" which took place on September 18 did not meet the due process requirements of a pre-deprivation hearing because it "did not allow [Homar] to make a meaningful response to the

damaging information found in the supplemental report." D. Ct. Op., typescript at 15. We agree.

During the September 18 meeting, Levanowitz only told Homar that the State Police had given him some "evidence very serious in nature." App. at 164. While it safely can be presumed that Homar knew that ESU's concerns about his employment arose from his arrest on drug charges, Homar was not aware of the allegations made against him by the troopers that were presented in the Supplemental Report, namely that he allegedly confessed to knowing that Crompton and Habhab were drug dealers and to receiving marijuana from Habhab during his employment as a police officer. More to the point, Homar was completely unaware that Levanowitz had received a copy of the Supplemental Report containing these allegations. Under these circumstances it is very clear that Homar's right to a meaningful pre-deprivation hearing was denied. *See Tucker*, 868 F.2d at 80 (holding that suspended police officers who were not told anything specific about drug use allegations or the evidence regarding the allegations were deprived of their due process rights because they had no opportunity to explain or rebut evidence).

In spite of its conclusion regarding the insufficiency of the September 18 "administrative hearing," the district court entered summary judgment in favor of defendants because it concluded that Homar's September 24, 1995 meeting with President Gilbert, prior to which Homar had received and read the Supplemental Report, was a meaningful pre-termination hearing. D. Ct. Op., typescript at 16. Given that Homar was afforded an opportunity to review the Supplemental Report and offer meaningful responses to the allegations, we find that this meeting afforded Homar with sufficient procedural due process protections *assuming it took place prior to his demotion becoming effective*. While true that an employee is not entitled

to a pre-*decision* hearing, *see Chung v. Park*, 514 F.2d 382, 387 (3d Cir.), *cert. denied*, 423 U.S. 948 (1975), only if this hearing took place before his demotion *took effect* can we conclude that he was afforded meaningful due process.

The district court held as a matter of law that Homar's dismissal from his position as a police officer took effect only after this meeting with President Gilbert. D. Ct. Op., typescript at 16. The district court found that the meeting, which took place at 2 p.m. on September 24, 1992, "occurred before Homar would have started his evening shift as police officer should Gilbert have decided to reinstate him to that position," *id.*, and thus concluded that "Gilbert's decision that Homar could not return to ESU as a police officer is properly viewed as the point in time when Homar was deprived of his position as an ESU police officer." *Id.*

We disagree with the district court that the point in time at which Homar's demotion became effective is clear. There is substantial evidence in the record to support a conclusion that Homar's demotion took effect *prior* to this meeting. Homar's meeting with Gilbert took place on September 24 at 2:00 p.m. The letter which Levanowitz sent to Homar apprising him that he had been demoted to Groundskeeper was dated on September 23, 1992. In that letter, Levanowitz informed Homar that he was "to be demoted from [his] position as a Police Officer I in the Campus Police Department to the position of Groundskeeper, a position [he] *formerly* held." App. at 208 (emphasis added). The letter further required that Homar "report to work at *7:00 A.M. on September 24, 1992,*" to start his job as groundskeeper, and informed Homar that this "action is effective retroactive to August 26, 1992." App. at 208 (emphasis added). Homar testified during a deposition that he was already working as a groundskeeper at the time of his September 24th, 2:00 p.m. meeting with Gilbert. There is thus

evidence suggesting that Homar had already been demoted to groundskeeper by the time this meeting took place. If this is true, then Homar was deprived of a meaningful pre-deprivation hearing.

The district court based its contrary conclusion on two grounds. First, the court determined that "[t]he significance of the meeting was that Gilbert held ultimate decision-making authority regarding whether Homar would remain employed by ESU as a police officer." D. Ct. Op., typescript at 15. However, this meeting with Gilbert never would have occurred had Homar's union representative not sought to arrange for the meeting with Gilbert. App. at 225. This fact seems to suggest that Levanowitz's demotion of Homar would have become effective without Gilbert's approval, which would render Levanowitz's letter the final demotion. Levanowitz's authoritative tone in the letter similarly supports this conclusion.

The district court also concluded that the meeting with Gilbert had taken place prior to Homar's demotion because it occurred before 4 p.m., the time at which Homar would normally begin his shift as a police officer. *Id.* at 16. We disagree that the timing of the demotion is so clear. We think there is certainly an issue of material fact as to whether Homar's demotion became effective on August 26, as stated in the letter; at 7:00 a.m. on September 24, the date he was told to report to work as a groundskeeper; or at 4:00 p.m. on September 24, the time at which Homar would normally report to work as a police officer. Unless defendants expected Homar to act as both groundskeeper and police officer on September 24, the facts appear to support the conclusion that Homar's demotion was effective at the latest by 7 a.m. on the morning of September 24th, seven hours prior to his meeting with Gilbert.

We thus conclude that there is a genuine issue of material fact regarding the date and time at which Homar's demotion became effective, and that the district court's grant of summary judgment was therefore inappropriate. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (holding summary judgment is inappropriate if there is evidence "such that a reasonable jury could return a verdict for the nonmoving party."). Accordingly, we reverse the district court's entry of summary judgment regarding Homar's meaningful pre-deprivation hearing.

IV.

Homar also contends that there is an issue of material fact as to whether his substantive due process rights were violated. Relying on this court's precedent in *Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 692 (3d Cir.1993) in which we stated that "[a] violation of substantive due process rights is proven: ... 'if the government's actions in a particular case were in fact motivated by bias, bad faith or improper motive ...,' " *id.* (quoting *Midnight Sessions, Ltd. v. City of Philadelphia,* 945 F.2d 683 (3d Cir.1991), *cert. denied,* 503 U.S. 984 (1992)), Homar points to several facts that he argues demonstrate that his suspension and demotion were motivated by bias, bad faith or improper motive.

The district court granted summary judgment in favor of defendants on this claim on the ground that there was no genuine issue of material fact as to whether Levanowitz, Gilbert or any other ESU official was motivated by bias, bad faith or improper motive.

While we agree with the district court that the evidence in this case does not support a conclusion that Levanowitz or any other ESU official was motivated by an improper motive in

suspending and then demoting Homar, for there is, indeed, "nothing improper about conducting an investigation of a law enforcement officer who has been arrested, even if the charges are ultimately dismissed," D. Ct. Op., typescript at 23, we think that there is a question of material fact as to whether ESU officials acted in bad faith. Several events leading up to Homar's demotion suggest that Levanowitz did not engage in a good faith effort to accord Homar appropriate due process protection throughout his ordeal. Levanowitz never informed Homar that he had received and read the Supplemental Report prior to their September 18 meeting; Levanowitz ordered that a poll be taken among police officers regarding whether Homar should be allowed to return to the force, which is certainly a very strange proceeding outside the realm of traditional due process proceedings; and Levanowitz issued the September 23 letter of demotion prior to the meeting with President Gilbert--a meeting which occurred only after Homar's union representative requested it take place. Such events might lead a reasonable fact-finder to conclude that Homar's demotion was pre-determined and to view the entire demotion process as rigged to produce this result.

Our conclusion that there is a genuine issue of material fact as to whether ESU officials were motivated by bad faith, however, does not lead us to remand this matter simply for a factual finding. A more fundamental legal question must first be addressed, namely whether Homar's property interest in his state-created job is an interest worthy of protection under substantive due process. *DeBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592, 598, 600 (3d Cir.1993) (holding that before addressing the sufficiency of the evidence of improper motive, a court addressing a substantive due process claim should first consider whether the plaintiff possesses a property interest worthy of substantive due process protection). Although Homar has succeeded in making a procedural due

process claim, under the law of this circuit "not all property interests worthy of procedural due process protections are protected by the concept of substantive due process." *Reich v. Beharry*, 883 F.2d 239, 244 (3d Cir.1989). In order to state a substantive due process claim, "a plaintiff must have been deprived of a certain quality of property interest." *DeBlasio*, 53 F.3d at 600.

The parties did not address before the district court the question of whether a state-created property interest in employment is the "certain quality" of property interest worthy of protection under the substantive due process clause, nor did the district court consider it. While courts of appeals do have discretion to consider and resolve certain issues for the first time on appeal, such as where the proper resolution is not in doubt or where " 'injustice might otherwise result,' " *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (quoting *Hormel v. Helvering*, 312 U.S. 552, 557 (1941)); *see also Nelson v. County of Allegheny*, 60 F.3d 1010, 1013 n. 3 (3d Cir.1995), it is a general rule that federal appellate courts do not consider an issue not passed upon below. *Singleton*, 428 U.S. at 120.

In the instant case, we think it appropriate to remand this issue for consideration in the first instance by the district court. Certainly this is not a situation where the proper resolution is clear. Rather, the case law of this circuit and the Supreme Court provides very little guidance as to what constitutes this "certain quality" of property interest worthy of protection under the substantive due process clause. We have held that "ownership is a property interest worthy of substantive due process protection," *id.*, but we have found that neither interest in prompt receipt of payment for professional services provided to the state, *Reich*, 883 F.2d at 244-45, nor state law entitlement to water and sewer services, *Ransom v. Marrazzo*, 848 F.2d 398, 411-12 (3d Cir.1988) are the "certain

quality" of property interest worthy of substantive due process protection. We also have strongly suggested in dictum that a student's right to continued enrollment in a graduate program does not rise to such a level on the ground that such an interest bears " 'little resemblance to the fundamental interests that previously had been viewed as implicitly protected by the Constitution.' " *Mauriello v. U. of Med. & Dentistry of N.J.*, 781 F.2d 46, 40 (3d Cir.1986) (quoting *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 229-30 (Powell, J., concurring). None of the property interests formerly considered are especially analogous to the property interest in state-created employment. Given the complexity of this issue, we think it appropriate to allow the district court the first opportunity to consider it. Should this issue return to us on appeal, we will benefit from the district court's analysis. Furthermore, we have already determined to remand this matter on the procedural due process ground as well, eliminating any concern about the injustice of delaying the final conclusion of this case. Accordingly, we remand this question to the district court for consideration there.

V.

Additionally, Homar contends that a genuine issue of material fact exists as to whether Homar's due process rights were violated because defendants made public statements about his suspension that stigmatized Homar and damaged his reputation. Specifically, Homar alleges that ESU violated his protected liberty interest in two ways. First, he alleges that ESU seriously damaged his good name and reputation by publicly disclosing the charges against him. Second, Homar alleges that ESU imposed a stigma or disability on him, foreclosing his freedom to take advantage of other employment opportunities. We will address these two claims in turn.

A.

The Supreme Court has held that a person has a liberty interest in employment actions which require due process "where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him." *Roth*, 408 U.S. at 573. Homar claims that this liberty interest was implicated in the instant case because ESU's demotion of him " 'damage[d] his standing and associations in the community.' " Appellant's Brief at 28 (citing *Roth*, 408 U.S. at 573. Homar may only prevail on this claim if he can demonstrate that the government "create[d] and disseminate[d] a false and defamatory impression about [him] in connection with his termination." *Codd v. Velger*, 429 U.S. 624, 628 (1977) (per curiam). *See also Bishop v. Wood*, 426 U.S. 341, 348-49 (1976).

Homar contends that ESU's disclosure of its investigation into his activities in a small article that appeared in the Pocono Record newspaper,[8] coupled with his subsequent demotion, implicated his liberty interest. We disagree. The

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[8]The text of the article, which appeared on the September 3, 1992 edition of the paper, reads as follows:

> East Stroudsburg University should decide by next week whether to reinstate suspended ESU police officer Richard J. Homar.
>
> Charges were dropped Tuesday against Homar, 26, after District Justice Charles Eyer ruled their [sic] wasn't enough evidence to hold him for trial. Homar had been charged with possession and delivery of marijuana and criminal conspiracy.
>
> Jerry Levanowitz, ESU's director of Human Resources, said the university is still conducting its investigation. "The dropping of the charges has been noted," he said.
>
> Once the investigation is completed a due process hearing will be held for Homar and a decision will be rendered, Levanowitz said.
>
> Last week, state police arrested Homar, an ESU officer for about six months, and two other men for allegedly conspiring to sell marijuana.

App. at 213.

article in the newspaper did not disclose any specifics regarding the nature of ESU's concern, nor did it disclose information about the disciplinary action ESU contemplated. Furthermore, the article appeared prior to his demotion, and there is no evidence to indicate that ESU publicly disclosed the outcome of its investigation or the fact that it demoted Homar to groundskeeper. We accordingly find that Homar has no liberty interest claim. *See Tucker*, 868 F.2d at 82 (holding that no liberty interest was implicated when press release about discharge of police officers was not misleading).

B.

Homar further alleges that ESU violated his liberty interest because it imposed "a stigma ... that foreclosed his freedom to take advantage of other employment opportunities." *Roth*, 408 U.S. at 573. Yet Homar has proffered no evidence to suggest that the disciplinary actions taken by the university had in any way foreclosed other employment opportunities.[9] Indeed, Homar testified at his deposition that he had not sought out a position with any other employer since his demotion. App. at 50. Furthermore, as noted above, Homar makes no allegations that any information in the newspaper article was untrue; the university never even publicly disclosed that Homar was terminated from his job as police officer. Under such circumstances, we cannot find that Homar's liberty interest was implicated. *Tucker*, 868 F.2d at 83.

Accordingly, we affirm the district court's issuance of summary judgment as to this issue.

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[9]Homar testified during his deposition that, prior to his arrest he had applied for two part-time jobs for which he was not hired. App. at 97, 102. No evidence was proffered, however, to indicate that his arrest was the reason he was not offered these jobs.

VI.

For the foregoing reasons, we affirm in part, reverse in part and remand for further proceedings consistent with this opinion.

ALITO, *Circuit Judge*, concurring in part and dissenting in part.

I write separately for two reasons. First, I would hold, based on the undisputed facts of this case, that the university's suspension of Homar without pay and without a hearing did not violate the principles of procedural due process as interpreted by the Supreme Court. I thus dissent from section III.A of the majority's opinion. Second, although I do not disagree with the majority's decision to remand the substantive due process question to the district court, I wish to set forth my own views on that issue.

I.

A. Due process does not always require a pre-suspension hearing. *See, e.g., FDIC v. Mallen*, 486 U.S. 230, 240-41 (1988); *Barry v. Barchi*, 443 U.S. 55, 63-66 (1979). In *Mallen*, the Supreme Court observed that "[a]n important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." *Id.* at 240 (citations omitted); *see also Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) ("[T]he timing and nature of the required hearing 'will depend on appropriate accommodation of the competing interests involved. These include the importance of the private interest and the length or finality of the deprivation, the likelihood of governmental error, and the magnitude of the governmental interests involved.") (citations and footnote omitted). In my view, this exception should apply here. *See, e.g., Ambus v. Granite Bd. of Educ.*, 975 F.2d 1555, 1562 (10th Cir.1992), *aff'd as modified on other ground*, 995 F.2d 992 (10th Cir.1993) (en banc).

Under the particular circumstances of this case, a pre-suspension hearing was not, in my view, essential. Within a few hours of the August 26, 1992, drug raid that resulted in Homar's arrest, the university learned that Homar had been charged with possession of marijuana, possession with intent to deliver marijuana, and criminal conspiracy. Homar did not report to work on August 26 for his 4:00 p.m. to 12:00 p.m. shift. The next day, Homar called his police chief to say that he had been arrested and to ask whether he was suspended. Homar was informed that he was suspended, and this was confirmed by letter delivered the same day.[1]

I do not think that the university violated Homar's right to procedural due process when it suspended him from his position as a campus police officer after learning that he had been arrested and charged with drug violations. There was probable cause to support the criminal charges and hence a substantial assurance that the deprivation was not baseless or unwarranted. The university was certainly entitled to take the position that Homar could not be permitted to work as a campus police officer with such charges outstanding, and there was thus, as the majority concedes, a compelling government interest present. And the university needed to act promptly. The majority admits all of this but finds that the university had to suspend Homar with pay. I find no requirement that in such circumstances a public employer must pay its suspended employees.

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[1]As I discuss further, *infra*, given Homar's immediate admission of his arrest, I am at a loss as to what purpose a pre-suspension hearing would have served in this case. *See generally Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (one factor to consider in determining what due process requires is the probable value, if any, of additional procedural safeguards).

B. In reaching its conclusion to the contrary, the majority declares that "a governmental employer may not suspend an employee without pay unless that suspension is preceded by some kind of pre-suspension hearing." Majority Opinion, at 12. The majority essentially announces a blanket rule that a public employer that wishes to suspend an employee--even an employee in a public-safety position who has been charged with multiple felonies--must either provide a pre-suspension hearing or suspend the employee with pay. This holding is based on one sentence of dictum from *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 544-45 (1985), the Eleventh Circuit's reliance on that dictum in *Everett v. Napper*, 833 F.2d 1507, 1512 (11th Cir.1987), and this court's opinion in *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064 (3d Cir.1990). These bases do not, in my view, withstand scrutiny.

With regard to *Loudermill*, I note that the Supreme Court there expressly recognized that "[t]here are, of course, some situations in which a postdeprivation hearing will satisfy due process requirements." *Loudermill*, 470 U.S. at 542 n. 7 (citations omitted). It is of course true, as the Court later notes, that an employer can avoid any due process problems associated with keeping a dangerous employee on the job by suspending the employee with pay, *id.* at 544-45, "for then there is not a deprivation." *Bailey v. Board of County Commissioners of Alachua County*, 956 F.2d 1112, 1124 n. 13 (11th Cir.), *cert. denied*, 506 U.S. 832 (1992). But as the Federal Circuit has explained, this "is merely descriptive, not normative. We agree that in the instant case, the government could have suspended with pay. Nevertheless, we cannot read *Loudermill* as holding that the government must suspend him with pay." *Engdahl v. Department of Navy*, 900 F.2d 1572, 1578 (Fed.Cir.1990). I agree.

The Eleventh Circuit's decision in *Everett*, which was issued before the Supreme Court's decision in *Mallen*, simply relies on the *Loudermill* dictum. Numerous courts of appeals have reached a contrary conclusion regarding the import of *Loudermill*, particularly after *Mallen*. *See Jones v. City of Gary*, 57 F.3d 1435, 1441-45 (7th Cir.1995) (no pre-suspension hearing required where firefighter was suspended without pay; plaintiff's property interests were adequately protected by post-deprivation hearing); *id.* at 1445-46 (Ripple, J., concurring) ("there are circumstances in which the need for swift action on the part of those who exercise governmental authority and responsibility for the safety and security of others can justify the elimination or truncation of even the bare-bones pretermination hearing required by *Loudermill*") (citations omitted); *Chaney v. Suburban Bus Div. of the Regional Transp. Auth.*, 52 F.3d 623, 628 (7th Cir.1995) (plaintiff bus driver suspended without pay after bus hit and injured pedestrian; no pre-suspension hearing necessary as employer's interests "clearly outweigh[ed]" those of plaintiff); *Ambus v. Granite Bd. of Educ.*, 975 F.2d 1555, 1562 (10th Cir.1992) (court discussed *Loudermill* but applied the *Mallen* exception where a teacher was suspended without pay and without a hearing after the school learned that the teacher had been arrested on drug charges; court stated that "the substantiated knowledge that a teacher had been arrested for drug sales raised a substantial government interest justifying immediate suspension without pay"), *aff'd as modified on other ground*, 995 F.2d 992 (10th Cir.1993) (en banc); *Strong v. Board of Educ. of Uniondale Union Free School Dist.*, 902 F.2d 208, 212 (2d Cir.) (citing *Loudermill* and *Mallen*, court concluded that, on balance, no pre-termination hearing required; court stressed that probable value of hearing was not very great because parties were well aware of each other's assertions), *cert. denied*, 498 U.S. 897 (1990); *see also Richardson v. U.S. Customs Service*, 47 F.3d 415, 418-19 (Fed.Cir.1995)

(discussing 5 U.S.C. § 7513(b)(1)) ("[A]n indictment for a crime for which a sentence of imprisonment may be imposed will, as a general rule, provide reasonable cause for an agency to believe that the employee has committed such a crime, and, when the nature of the crime alleged relates to the employee's ability to perform his or her duties, an agency may summarily suspend the employee, without pay, pending the outcome of the criminal proceedings.") (citations omitted); *Bailey v. Board of County Commissioners of Alachua County*, 956 F.2d 1112, 1123-24 & n. 13 (11th Cir.) (qualified immunity) (stressing flexibility of standard regarding necessity of pre-deprivation hearing where prison guard was suspended without pay upon his arrest), *cert. denied*, 506 U.S. 832 (1992); *Gamble v. Webb*, 806 F.2d 1258, 1261 (5th Cir.1986) (relying upon *Loudermill*'s statement that " 'there are, of course, some situations in which a post-deprivation hearing will satisfy due process,' " and concluding, under *Logan* balancing test, that "the present one is such a situation") (quoting *Loudermill*, 470 U.S. at 542 n. 7) (brackets omitted). All of these decisions--like the Supreme Court's procedural due process cases in general and unlike the majority's blanket rule--reflect a balancing of interests based on the particular circumstances of each case.

I also believe that the majority has misinterpreted our opinion in *Bradley*. Citing *Bradley*, 913 F.2d at 1077, the majority states that *Bradley* implies that suspension without pay and without a pre-suspension hearing always violates due process. Majority Opinion, at 11-12. However, on the next page of the *Bradley* opinion, the panel clearly stated:

> We need not decide in this case whether Bradley was entitled to a pre-suspension hearing, as he contends, or whether a post-suspension hearing sufficed. *Compare Loudermill*, 470 U.S. at 544, 105 S.Ct. at 1494

(because government's interest in immediate termination of security guard who had lied when seeking employment did not outweigh employee's interest in retaining employment, pre-termination hearing was required) *with FDIC v. Mallen*, 486 U.S. 230, 108 S.Ct. 1780, 1787-88, 100 L.Ed.2d 265 (1988) (because government had substantial interest in suspending indicted bank official to protect bank and depositors, a post-suspension hearing within a reasonable time was sufficient).

Bradley received no hearing, either before or after the suspension, and hence if he was suspended, as the record suggests, he was deprived of due process.

913 F.2d at 1078. In my view, far from implying anything, the *Bradley* panel expressly reserved decision on the issue presented in this case.[2]

I would resolve that issue in this case by following the great weight of federal appellate authority cited above and holding that whether a pre-suspension hearing was required in this particular case requires a balancing of the relevant factors.

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[2]The majority also defends its reliance on *Bradley* by characterizing the *Loudermill* dictum and the *Mallen* exception as one and the same. *See* Majority Opinion, at 11 & n.3. I do not agree with this assessment. *Loudermill* states that an employer may satisfy due process by suspending an employee with pay. That was not done in *Bradley*, and so the district court's reliance on the *Loudermill* dictum was rightly held to be improper. But defendants in *Bradley*--like defendants in this case--argued separately that they came within the independent *Mallen* exception--pursuant to which pay is not required--and that a pre-suspension hearing thus was not necessary. We did not decide whether *Mallen* excused the need for a pre-suspension hearing because Bradley did not receive even a post-suspension hearing. I see nothing "inconsistent" in *Bradley*, nor do I read *Bradley* as "necessarily [ ] reject[ing]" the possible adequacy of a post-suspension hearing in circumstances like those here.

For the reasons already expressed above, I would hold that in the circumstances of this case, a pre-suspension hearing was not required and that a post-suspension hearing within a reasonable time after the suspension was sufficient. It may be that the university failed to conduct a sufficiently prompt or adequate post-suspension hearing after the criminal charges were dismissed on September 1, 1992, but that is a different question. Moreover, as in *Strong*, I am not sure how a pre-suspension hearing on August 26, 1992, would have made any difference. The only fact important to the university's decision was whether Homar had been arrested and charged. Homar did not dispute this, and in fact confirmed it the next day; Homar was well aware of the reasons for his suspension. As in *Strong*, the hearing required by the majority would have been "an empty formality." *See Strong*, 902 F.2d at 212.

C. I have one final problem with the section of the majority opinion dealing with the need for a pre-suspension hearing. The majority assumes that an important government interest requiring prompt action is what permits an employer to suspend an employee without a pre-suspension hearing but with pay. I think that this is inaccurate. It is my understanding that a public employer may generally suspend a public employee for cause, with pay, and without a hearing--even absent an emergency situation--because such a suspension does not ordinarily implicate any constitutionally protected property interest. *See, e.g., Hicks v. City of Watonga*, 942 F.2d 737, 746 n. 4 (10th Cir.1991) ("[N]o property interest was infringed at Mr. Hicks' first round of hearings when he was suspended and then reprimanded. Mr. Hicks suffered no loss in pay because of the pre-hearing suspension. Suspension with pay does not raise due process concerns.") (citations omitted); *Pitts v. Board of Educ. of U.S.D. 305, Salina, Kansas*, 869 F.2d 555, 556 (10th Cir.1989) (same); *see also Hardiman v. Jefferson County Bd. of Educ.*, 709 F.2d 635, 637-38 & n. 2

(11th Cir.1983) (not deciding but questioning whether suspension with pay could ever constitute deprivation of property interest, and opining that "bad-faith" suspension with pay might infringe liberty interest); *Koelsch v. Town of Amesbury*, 851 F.Supp. 497, 500 (D.Mass.1994) ("A public employee's suspension with pay does not implicate a constitutionally protected property interest.") (citations omitted). Under the majority's reasoning, the important government interest requiring prompt action is rendered a nullity because it simply allows the employer to do what it could do in a typical non-emergency, for-cause suspension situation, i.e., suspend the employee with pay.

II.

Although I do not disagree with the majority's determination that a remand is in order on Homar's substantive due process claim, I write separately to set forth my views on the viability of that claim. I do not think that a plaintiff has a substantive due process claim for a non-legislative deprivation of a state-created property right by a public employer. Moreover, if Homar has a substantive due process claim in this context, it seems to me that he must show that the employer's actions were not rationally related to a legitimate government interest; mere allegations of bad faith cannot suffice.

A. Neither the Supreme Court nor this court has previously held that a plaintiff has a substantive due process claim for a non-legislative deprivation of a state-created property interest by a public employer. The Eleventh Circuit recently overruled a decade of its own decisions recognizing such claims. *McKinney v. Pate*, 20 F.3d 1550 (11th Cir.1994) (en banc), *cert. denied*, 115 S.Ct. 898 (1995); *see also Rivkin v. Dover Twp. Rent Leveling Bd.*, 671 A.2d 567 (N.J. 1996). Essentially for the reasons stated in *McKinney*, which I find

persuasive, I believe that Homar's allegations state only procedural due process claims.

In *McKinney*, the Eleventh Circuit considered the following issue: "whether, under the Fourteenth Amendment, a government employee possessing a state-created property interest in his employment states a substantive due process claim, rather than a procedural due process claim, when he alleges that he was deprived of the employment interest by an arbitrary and capricious non-legislative government action." *Id.* at 1553. Sitting en banc, a unanimous Eleventh Circuit answered "no," and in an effort to bring its cases back into line with Supreme Court precedent, overruled a decade of its prior decisions.[3] The court held that "in non-legislative cases, only procedural due process claims are available to pretextually terminated employees." *Id.* at 1560; *see also Rivkin*, 671 A.2d at 577 (plaintiffs' purported substantive due process claim "is much closer to a procedural due process claim" in that it "amounts to an allegation that the State failed to furnish an impartial tribunal, which 'is a matter of procedural, not substantive, due process' ") (citations omitted).

Two aspects of the Eleventh Circuit's opinion in *McKinney* bear emphasis here. First, the court concluded that allegations of arbitrary and capricious action by governmental employers affecting an individual's property interest in public employment "will not make out a substantive due process claim under the jurisprudence of the Supreme Court ... because only *procedural* issues are implicated." *Id.* at 1559 (emphasis in original); *see also id.* at 1561 ("McKinney's allegation is procedural: the County failed to provide one of the elements

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[3]Those prior cases, like the test advocated by Homar, essentially required that a public employee show the deprivation of a property right in public employment for improper, pretextual, or arbitrary and capricious reasons.

of procedural due process--an unbiased decisionmaker.").[4] I agree, as I discuss further below.

Second, crucial to the court's decision was the distinction between legislative acts and non-legislative or executive acts. Executive acts, such as employment decisions, typically apply to one person or to a limited number of persons, while legislative acts, generally laws and broad executive regulations, apply to large segments of society. *Id.* at 1557 n. 9. The court criticized its prior decision in *Hearn v. City of Gainesville*, 688 F.2d 1328 (11th Cir.1982)--its first case to apply substantive due process analysis to an arbitrary termination claim--because "[i]n that case, where a terminated employee challenged an executive act, we cited *Nebbia [v. New York*, 291 U.S. 502 (1934)], where a legislative act (to wit, a law) was at issue." *Id.* at 1558 n. 14. The court added that "[i]t is imperative that a stricter segregation of these two distinct case-categories be maintained." *Id.* The court indicated that rational basis review under the substantive component of the Due Process Clause is appropriate only in the context of challenges to legislative action. *Id.* at 1557-58 & nn. 9 & 14; *see also TRM, Inc. v. United States*, 52 F.3d 941, 945 & n. 17 (11th Cir.1995) (applying rational basis review to substantive due process challenge to regulation under Food Stamp Act and noting that "[t]his standard is not affected by our decision in *McKinney* " because "[t]he holding of that case was specifically limited to substantive due process challenges to non-legislative acts") (citations omitted); *Sullivan Properties, Inc. v. City of Winter Springs*, 899 F.Supp. 587, 594-96 (M.D.Fla.1995) (considering the impact of *McKinney* on substantive due process challenges in the area of zoning and the granting of building

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[4]I note that the Supreme Court has never held that a public employee has a substantive due process right to be free from arbitrary or capricious conduct adversely affecting the employee's property interest in that employment.

permits; concluding that there is a "substantive due process cause of action for arbitrary and unreasonable zoning ordinances" but not for "substantive due process claims [challenging] executive acts granting or denying a particular building permit application").[5] I again agree.

Like the prior decisions in the Eleventh Circuit, a decision allowing Homar to maintain a substantive due process claim based on an allegation of bad faith would elevate Homar's procedural challenges to substantive due process status. Assuming that there is a factual issue regarding whether defendants acted in bad faith, I question the wisdom of recognizing a substantive due process claim where a university fails to provide adequate procedural due process and where the way in which procedural due process is denied could give rise to an inference of bad faith. This sort of "substantive procedural due process claim" is precisely what troubled both the Eleventh Circuit in *McKinney* and a unanimous New Jersey Supreme Court in *Rivkin*, and I would not recognize such a claim. It seems to me that Homar's claim is clearly procedural and should be recognized as such.

Further, the cases upon which Homar relies essentially derive--as is discussed more fully below--from *Pace Resources, Inc. v. Shrewsbury Tp.*, 808 F.2d 1023 (3d Cir.), *cert. denied*, 482 U.S. 906 (1987), and *Rogin v. Bensalem Tp.*, 616 F.2d 680, 689 (3d Cir.1980), *cert. denied*, 450 U.S. 1029 (1981), both of which involve challenges to zoning ordinances and thus

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[5]See also *Kauth v. Hartford Ins. Co. of Illinois*, 852 F.2d 951, 956-58 (7th Cir.1988) (plaintiff alleged not that statute or regulation was unconstitutional but that sheriff arbitrarily ignored law in seizing property; court found that "in cases where the plaintiff complains that he has been unreasonably deprived of a state-created property interest, without alleging a violation of some other substantive constitutional right or that the available state remedies are inadequate, the plaintiff has not stated a substantive due process claim") (citations omitted).

challenges to legislative acts. The cases that have applied *Pace Resources* and *Rogin* in challenges to non-legislative acts have, in my view, fallen into the trap identified by the Eleventh Circuit in *McKinney*. I would not extend them into the public employment setting.

B. Assuming for the sake of argument that there is a substantive due process claim for arbitrary and capricious non-legislative actions by public employers and that Homar's interest in his position as a campus police officer constituted a "property" interest for substantive due process purposes,[6] I

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[6]*But see, e.g., Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214, 229 (1985) (Powell, J.,concurring) ("As the Court correctly points out, respondent's claim to a property right is dubious at best. Even if one assumes the existence of a property right, however, not every such right is entitled to the protection of substantive due process. While property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution, substantive due process rights are created only by the Constitution."); *DeBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592, 598-601 (3d Cir.) ("to state a substantive due process claim, a plaintiff must have been deprived of a particular quality of property interest"), *cert. denied*, 116 S.Ct. 352 (1995); *Reich v. Beharry*, 883 F.2d 239, 243-44 (3d Cir.1989) ("While, as we have discussed above, it is well settled that state-created property interests, including some contract rights, implicate the protection of the procedural aspect of the due process clause, the issue of whether and when state-created property interests invoke substantive due process concerns has not been decided by the Supreme Court and is subject to varying analyses and conclusions by the lower courts.... [We have] acknowledged that what constitutes a property interest in the procedural due process context might not constitute one in that of substantive due process.... [I]n this circuit, at least, not all property interests worthy of procedural due process protection are protected by the concept of substantive due process.") (citations omitted); *Ransom v. Marrazzo*, 848 F.2d 398, 411-12 (3d Cir.1988) ("Substantive due process refers to and protects federal rights. The provision of water and sewer services, whether by a municipality or by a private utility company, is not, however, a federally protected right. The legal fact that, once a municipality (or, for that matter, a private utility company) establishes a utility for its citizens, a citizen's expectation of receiving that service rises to the level of a property interest cognizable under the Due Process Clause, merely brings that expectation within the compass of the Fourteenth Amendment's procedural protections.... It does not transform that expectation into a substantive

nonetheless conclude that Homar seeks application of the wrong standard in evaluating his claim. Under true rational basis review--which is the most that Homar is entitled to where he is asserting the violation of a non-fundamental, state-created property interest--I think that Homar failed to create a fact issue as to whether the university violated his substantive due process rights.

The appropriateness of summary judgment as to Homar's substantive due process claim requires consideration of what Homar must show to establish a substantive due process violation. Homar argues that our cases hold that a plaintiff can establish a substantive due process violation by proving that the government's actions were motivated by bias, bad faith, or improper motive. Homar contends that a public employee who suffers an adverse employment decision may maintain a substantive due process claim against the public employer by showing (1) that the employer's actions were not rationally related to a legitimate government interest or (2) that the employer's actions were motivated by (a) bias, (b) bad faith, or (c) improper motive. I do not agree.

First, as I alluded to above, we have never applied this test in the public employment context, and I would not extend this test to this context, whatever its appropriateness in other contexts. Further, it seems to me that the statements in our opinions regarding the nature of rational basis review in substantive due process cases have evolved in a strange and, I think, unintended way. Beginning with unobjectionable descriptions of classical rational basis review, our opinions eventually reached the point of suggesting that a plaintiff can state a substantive due process claim merely by alleging that an

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guarantee against the state in any circumstance.") (citations omitted).

individual decision resulting in the deprivation of a property right was taken in bad faith. The Supreme Court has never sanctioned such a broad proposition, and I am confident that this cannot be the law. If a plaintiff like Homar has a substantive due process claim in this context, it seems to me that he must show that the employer's actions were not rationally related to a legitimate government interest and that mere allegations of bad faith cannot suffice.

In *Pace Resources, Inc. v. Shrewsbury Tp.*, 808 F.2d 1023 (3d Cir.), *cert. denied*, 482 U.S. 906 (1987), plaintiff challenged a municipality's land use restrictions on substantive due process grounds. In describing the "narrow review" over zoning ordinances, we quoted our prior decision in *Rogin v. Bensalem Tp.*, 616 F.2d 680, 689 (3d Cir.1980), *cert. denied*, 450 U.S. 1029 (1981):

> " The test for determining whether a law comports with substantive due process is whether the law is rationally related to a legitimate state interest. '[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.' "

808 F.2d at 1034 (quoting *Rogin*, 616 F.2d at 689) (quoting *Williamson v. Lee Optical*, 348 U.S. 483, 487-88 (1955)) (brackets in *Rogin*). We explained that "[a] plaintiff making a substantive due process claim in federal court has the burden of showing that the regulation is arbitrary or irrational. Thus to state a claim, Pace's complaint would have to allege facts that would support a finding of arbitrary or irrational legislative action by the Township." *Id.* at 1035 (citations omitted). After concluding that "Pace's complaint fails to make any factual

allegations that indicate irrationality" and that "Pace does not present a case involving actions aimed at this developer for reasons unrelated to land use planning," we concluded that "[b]ecause it appears on the face of the amended complaint that the Township decisionmakers could have had rational reasons for the decisions contested here and because that complaint alleges no facts suggesting arbitrariness, it fails to state a substantive due process claim upon which relief can be granted." *Id.* at 1035-36 (citation omitted).

In *Bello v. Walker*, we noted the rational basis review articulated in *Pace Resources*, but we focused on the language from *Pace* stating that the plaintiff there did not allege "actions aimed at this developer for reasons unrelated to land use planning." *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir.) (citation omitted), *cert. denied,* 488 U.S. 851 (1988). We thus distinguished *Pace Resources* and announced as follows:

> We need not define, at this juncture, the outer limits of the showing necessary to demonstrate that a governmental action was arbitrary, irrational, or tainted by improper motive. The plaintiffs in this case presented evidence from which a fact finder could reasonably conclude that certain council members, acting in their capacity as officers of the municipality improperly interfered with the process by which the municipality issued building permits, and that they did so for partisan political or personal reasons unrelated to the merits of the application for the permits. These actions can have no relationship to any legitimate governmental objective, and if proven, are sufficient to establish a substantive due process violation actionable under section 1983.

Id. at 1129-30 (footnote omitted).

Next, the panel in *Midnight Sessions* paraphrased *Bello* and stated that "a plaintiff may maintain a claim of substantive due process violation upon allegations that the government deliberately and arbitrarily abused its power." *Midnight Sessions, Ltd. v. City of Phil.*, 945 F.2d 667, 683 (3d Cir.1991) (citation omitted), *cert. denied,* 503 U.S. 984 (1992). "Thus, allegations that the government's actions in a particular case were motivated by bias, bad faith, or improper motive ... may support a finding of substantive due process violation." *Id.* (citing *Bello* and *Pace Resources*).

In *Parkway Garage, Inc. v. City of Phil.*, 5 F.3d 685, 692 (3d Cir.1993), we explained that "[s]ubstantive due process protects citizens from arbitrary and irrational acts of government." *Id.* at 692 (citing *Rogin v. Bensalem Tp.*, 616 F.2d 680, 689 (3d Cir.1980), *cert. denied,* 450 U.S. 1029 (1981)).[7] We then stated the following test (which is the test quoted by the parties in this case): "A violation of substantive due process rights is proven: (1) if the government's actions were not rationally related to a legitimate interest; or (2) 'if the government's actions in a particular case were in fact motivated by bias, bad faith or improper motive.' " *Id.* (citation omitted); *see also Blanche Road Corp. v. Bensalem Tp.*, 57 F.3d 253, 263 (3d Cir.), *cert. denied*, 116 S.Ct. 303, 133 (1995).

From *Rogin* to *Parkway Garage,* then, we have moved from inquiring merely whether a legislative act survived pure rational basis review to inquiring whether actions by specific

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[7]*Rogin* presents, in my view, the proper scope of substantive due process review. There, we found that the township "has a legitimate interest in controlling population growth and density and the zoning amendments are a rational and reasonable means to accomplish that purpose. Therefore, the zoning amendments were not arbitrary or irrational...." *Id.* I find nothing in *Rogin* to support the broad proposition that substantive due process protects citizens in general from arbitrary and irrational acts of government.

defendants vis-a-vis a specific plaintiff were somehow improper. It seems to me that our cases began looking to governmental conduct that might prove a lack of rational basis, but we have now set forth an entirely separate test for evaluating substantive due process claims that is independent of standard rational basis review. *See also Rivkin*, 671 A.2d at 576-77 (declining to follow *DeBlasio* and *Bello* and stating that "[i]t is a mistake ... to equate the concept of 'arbitrary and irrational' governmental land use decisions with the substantive component of the Due Process Clause of the Fourteenth Amendment"). In my view, the court should take the next available opportunity to clarify that the appropriate test is true rational basis review.[8]

If we are to recognize substantive due process claims in the public employment context--which, for the reasons discussed above, I think would be a mistake--then, in my view, we should ask merely whether the plaintiff can show that the employer's actions were not rationally related to a legitimate government interest. It should not be enough to allege bad faith by a single governmental actor; the overall conduct complained of must be unrelated to any legitimate governmental interest. If this mode of analysis is applied to this case, I think that it is clear that the university's actions were rationally related to its legitimate interests, and, indeed, Homar does not contend otherwise.

C. In sum, substantive due process applies where there is a fundamental right at stake or legislation is challenged as

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[8]I note that some district court opinions in this circuit have recognized the mixed signals sent by this court. For example, in *Ersek v. Township of Springfield*, 822 F.Supp. 218 (E.D.Pa.1993), a public employment case, the court opined that *Bello* and *Pace Resources* do not apply outside of the building and zoning permit contexts. *Id.* at 221 (dicta).

having no rational relationship to any legitimate government interest. Here, plaintiff suggests no fundamental right within the meaning of the substantive component of the Due Process Clause; nor is plaintiff challenging a legislative act on rational-basis grounds. In my view, then, plaintiff has no substantive due process claim on the undisputed facts presented.[9]

III.

For the foregoing reasons, I respectfully dissent from the majority's conclusion, set forth in section III.A, that Homar had a right to a hearing prior to his suspension. Although I join in section IV of the opinion remanding the substantive due process issue to the district court, I do not believe that Homar's substantive due process claim should survive a motion for summary judgment on remand.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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[9]I also note the Supreme Court's consistent instruction that the substantive component of the Due Process Clause be narrowly construed. *E.g.*, *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) ("As a general matter, the Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.") (citation omitted); *see also Fagan v. City of Vineland*, 22 F.3d 1296, 1306 n. 6 (3d Cir.1994) (en banc) ("We cannot ignore the Supreme Court's repeated warnings against an overly generous interpretation of the substantive component of the Due Process Clause.").

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD J. HOMAR,	:	
	:	
Plaintiff	:	
	:	**CV-93-0852**
v.	:	
	:	**JUDGE VANASKIE**
JAMES E. GILBERT, et al.,	:	
	:	
Defendants	:	

MEMORANDUM

The Fourteenth Amendment to the Constitution protects against the deprivation of liberty and property without due process of law. In Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), the Supreme Court held that a public employee who enjoys a protectible property interest in his position may not be terminated without written or oral notice of the charges against him, an explanation of the employer's evidence, and an opportunity to respond.

Plaintiff Richard J. Homar, a former East Stroudsburg University ("ESU") police officer who was arrested and charged with various drug offenses, alleges that ESU and certain of its employees --defendants here --denied him due process when they suspended him without affording him notice and an opportunity to be heard prior to the suspension. Homar also contends that the Defendants denied him procedural and substantive due process when, after

conducting an internal investigation of the drug charges and his activities, the Defendants demoted Homar to the position of ESU groundskeeper, which was Homar's position prior to becoming a campus police officer. The demotion became effective following Homar's meeting with the individual who held ultimate authority regarding his employment status with ESU --Defendant James Gilbert, ESU's President.

Pending is Defendants' motion for summary judgment. Although Homar was initially suspended without pay, within thirty (30) days of his suspension Defendants agreed to pay Homar all of the wages he would have received as a police officer during the suspension period. Consequently, because he lost no salary due to the suspension and because Defendants did not terminate him, Homar suffered no compensable due process violation as a consequence of the suspension. See Hicks v. City of Watonga, 942 F.2d 737, 746 n. 6 (10th Cir. 1991) ("[s]uspensoin with pay does not raise due process concerns"); Pitts v. Board of Educ. Of U.S.D. 305, Salina, Kansas, 869 F.2d 555, 556 (10th Cir. 1989) (suspension of public employee with pay does not infringe any measurable property interest); Watkins v. McConologue, 820 F.Supp. 70, 72 (S.D. N.Y.), aff'd mem., 978 F.2d 706 (2nd Cir. 1992). Furthermore, even a suspension without pay would not have violated Homar's due process rights.

Nor did the Defendants fail to provide requisite process in connection with Homar's demotion. Homar was accorded the opportunity to respond to all charges against him before the demotion became effective, which was all the process that is required by Loudermill. Finally, Homar's suspension and demotion did not infringe his substantive due process rights, nor result in an unconstitutional deprivation

of a protected liberty interest. Accordingly, defendants' summary judgment motion will be granted.

I. FACTUAL AND PROCEDURAL BACKGROUND.[1]

Homar was arrested by state po lice in a drug raid at the apartment of James Compton in Monroe County, Pennsylvania, on the morning of August 26, 1992. A local newspaper reported the state police's drug arrests, in pertinent part, as follows:

> Police said Joseph Habhab of Tannersville and his family were at the core of the high-level distribution ring, which obtained 50 to 100 pounds of marijuana every few weeks from Mexico through Texas.
>
> * * *
>
> State police Sgt. Richard Morris said investigators found much of the marijuana was sold in the areas of East Stroudsburg University . . . . [Article attached to Dkt. Entry #28.]

In the early afternoon of August 26, the state police called David Marazas, ESU's Police Chief, to inform him of Homar's arrest and the charges against him. Those charges included possession of marijuana, possession with intent to deliver, and criminal conspiracy to violate the controlled substance law, which is a felony.

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[1] Defendants filed a statement of material facts (Dkt. Entry #19) to which Homar responded (Dkt. Entry #22).

By mid-afternoon Marazas brought the information to the attention of Gerald Levanowitz, ESU's Director of Human Resources, who was the ESU official to whom President Gilbert had delegated authority to discipline and suspend ESU employees. After meeting with Marazas, Levanowitz decided to suspend Homar immediately, without pay. (See Marazas Aug. 26 notes, attached to Ex. "13," Dkt. Entry #28.) Levanowitz did not conduct a pre-suspension hearing or provide Homar an opportunity to argue against his suspension. Levanowitz, however, did issue a suspension letter. (Letter attached to Dkt. Entry #25.)

Because Homar worked the second shift at ESU, he was to report for duty at 4:00 p.m. on August 26. He did not report to work that day.

The day after his arrest, on August 27, 1992, Homar called to tell Marazas that he had been arrested and to ask if he was suspended. (See Marazas Aug. 26 notes, attached to Ex. "13" dkt. Entry #28.) Marazas informed Homar that he was suspended and told Homar that he would deliver Levanowitz's suspension letter to him later that day. (Id.) The letter advised of the suspension pending further investigation and disposition of the criminal charges, but explained that ESU's ultimate decision in the matter would not necessarily coincide with disposition of the criminal charges.

On the same day (August 27), a Pennsylvania state trooper prepared a supplemental report describing his interview with Homar the previous day at 2:00 p.m. The supplemental report stated:

HOMAR related that he started to hang

> around COMPTON around January of 1992. Joseph HABHAB would come to COMPTON'S residence and that is how he (HOMAR) knows HABHAB. HOMAR knew that COMPTON and HABHAB were dealing in marijuana. HOMAR related that originally he knew that HABHAB and COMPTON were dealing in small amounts but since about January of 1992 he knew that they were dealing in large amounts of marijuana and that they were bringing the marijuana in from Texas. HOMAR further related that HABHAB had given him marijuana joints in the past for his personal use. [Report attached to Dkt. Entry #25.]

The report indicated that Homar "signed a waiver of his rights form."

During his deposition, Homar denied saying the substance of the statements attributed to him in the supplemental report. Homar explained:

> I feel they -- Larry Gerrard, the officer that was with me, was trying to confuse me at the time to make these statements --something like this. This isn't what I said myself, he was trying to persuade me. [Dkt. Entry #25 at 29.]

Homar addressed some of this confusion by explaining, for instance, that he did not have knowledge that marijuana was being imported from Texas: "I only stated that I knew . . . that his brother . . . lived in Texas and that he went to visit him." (Dkt. Entry #25 at 29.) Homar also

contested that he stated that Habhab had given him marijuana joints for personal use. (Id.) Regarding his relationship with Compton, Homar explained that, as opposed to the supplemental report's version that Homar knew Compton since 1992, he actually knew Compton "before high school and I was involved in high school athletics with him and things like that." (Dkt. Entry #25 at 27.)

Homar explained that on the morning of his arrest he visited Compton's apartment, which is located close to Homar's mother. (Dkt. Entry #25 at 17.) Homar stated:

> I went into his house, his apartment was unlit and I came down to the living room area of his house. I focused my attention on the TV. Jim was sitting on the couch at the time and I was telling him how I was ready to get going; I was in work clothes to do yard work and I just was in a hurry to get that over with. And I went to turn to his kitchen area to get a glass of water. I heard two men come down the hallway in plain, dark clothes and I was pushed to the ground. [Dkt. Entry #25 at 17-18.]

On September 1, 1992, a Pennsylvania state court dismissed the charges against Homar. Levanowitz learned of the dismissal the next day, but continued his own investigation. On September 11, 1992, Levanowitz met with the state police to inquire about Homar's arrest.[2] The state

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[2] Defendants contended in their statement of material facts that "Levanowitz felt he needed to do his own investigation of the events before deciding on the discipline of Homar." (Dkt. Entry #19 at ¶18.) Homar refuted the contention, stating: "This objective belief of Levanowitz . . . would constitute

police provided a copy of the supplemental report to Levanowitz and related a far different story of the circumstances surrounding Homar's arrest than maintained by Homar. Levanowitz's notes state:

> Trooper George said that when he entered the Compton residence on August 26, 1992, Mr. Homar was seated on a sofa in the living room of the house. When Trooper George yelled State Police and entered the house, Mr. Homar got up and moved quickly toward the kitchen of the residence. Troopers [sic] George saw a metallic object flashing/flying from Mr. Homar's direction which he thought might be a gun. Then he drew his weapon. Trooper George related that the metallic object later turned out to be a metal plate used for processing and cutting marijuana. Trooper George and Raab told me that there were four marijuana "joints" on a coffee table where Mr. Homar had been sitting and one of the joints was half burned and there was a heavy odor of marijuana smoke in the house. They told me that a search of the premises turned up a triple beam scale, five pounds of marijuana and paraphernalia. [Dkt. Entry #28 at Ex. "1," p. 1.]

On September 15, 1992, Levanowitz called Homar to schedule a meeting for September 18. Levanowitz told

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a jury question." (Dkt. Entry #22 at ¶18.) Despite Homar's framing of the matter, Levanowitz's purported belief does not create a "material fact." Homar's disagreement with other immaterial facts does not preclude adjudication of this case on Defendants' summary judgment motion.

Homar that a union representative would be permitted to attend the meeting with him, but that since, in Levanowitz's opinion, the meeting would be an administrative hearing, Homar did not have a right to have an attorney attend. (Levanowitz Deposition (Dkt. Entry #26) at 42.)

Homar and his union representative, Richard Connell, attended the September 18th meeting with Levanowitz. Connell requested that Homar's attorney be present, and Levanowitz responded that the meeting would have to be postponed because an attorney for ESU also would have to be present. (Dkt. Entry #26 at 52.) The meeting then proceeded without Homar's attorney attending. Homar did not have a copy of the State Police "supplemental report" as of the date of the meeting.

Levanowitz maintains that during the meeting he represented that he "had already done [his] investigation, with the rest of the investigation including talking to the State Police." (Levanowitz Dep. at 48.) Levanowitz also asserts that he represented during the meeting "that the State Police had given me some evidence very serious in nature." (Id.) Homar acknowledged that Levanowitz requested Homar's "side of the story [as] to what happened on August 26, 1992." (Dkt. Entry #22 at § 24.) However, Levanowitz did not divulge the substance of the supplemental report during the meeting. Consequently, Homar was not able to respond to the damaging statements attributed to him in the supplemental report.

Levanowitz issued a letter to Homar dated September 23, 1992, in which Levanowitz demoted Homar to groundskeeper. The letter, in part, stated:

> This is to inform you that you are to be demoted from your position as a Police Officer I in the Campus Police Department to the position of Groundskeeper . . . . This action is effective retroactive to August 26, 1992, and you are to be given back pay to that date at the rate of pay for a Groundskeeper. You are to report to work at 7:00 A.M. on September 24, 1992 at the Facilities Management Office. . . .
>
> This action is being taken as a result of admissions made by yourself to the Pennsylvania State Police on August 26, 1992 that you maintained associations with individuals whom you knew were dealing in large quantities of marijuana and that you obtained marijuana from one of those individuals for your own use. Your actions constitute a clear and flagrant violation of Sections 200 and 200.2 of the East Stroudsburg University Police Department Manual. [Dkt. Entry #25 at Ex. "2" (emphasis in original).][3]

Although in the letter Levanowitz provided Homar with back pay for the suspension period at the rate paid to a groundskeeper, he later provided Homar with a retroactive payment of the difference between the groundskeeper salary and the police officer salary for the suspension period. (Dkt.

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[3] During his deposition, Homar suggested that he was working as a groundskeeper at the time that LEVANOWITZ made the demotion decision. (Dkt. Entry #25 at 45.) It is unclear whether Homar was permitted to work in a non-law enforcement capacity during the period of his suspension.

Entry #19 at ¶ 51; Homar Dep. at 24-25.) Thus, although the letter purported to make the demotion retroactive, it did not take effect until after September 24, 1992. Homar consequently does not claim that he lost pay or benefits during the period of his suspension. (Homar Dep. at 24.)[4]

Before Homar's suspension was to take effect, Homar's union representatives contacted President Gilbert, who had final authority with regard to Homar's status as an ESU employee, to request a meeting to discuss Levanowitz's disciplinary action. They requested the meeting "because we felt that maybe Mr. Levanowitz ws only giving his side of the story and not giving a fair -- he wasn't giving me a fair shake on his conversations with Dr. Gilbert." (Dkt. Entry #25 at 45.) Gilbert arranged a meeting at 2:00 p.m. on September 24th.

Although Levanowitz had not provided Homar with a copy of the supplemental report during their September 18th meeting, Homar was in possession of the supplemental report by the time that th meeting with Gilbert occurred. (Dkt. Entry #25 at 46.) Homar also had Levanowitz's demotion letter, which explained that the information contained in the letter, which explained that the information contained in the supplemental report formed the basis for the demotion decision.

Connell, the union representative who attended the

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[4] Although Homar conceded during his deposition that he did not lose benefits, Homar contended in his response to Defendants' statement of material facts that "[i]t is unknown to plaintiff whether any non-salary benefits were affected." (Dkt. Entry #22 at ¶ 10.) Curiously, however, Homar admitted the defendants' very last material fact, stating: "Homar does not claim he lost pay or benefits during the period of suspension." (Dkt. Entry #22 at ¶ 52.)

earlier meeting, Dave Pottiger, a union vice president, Homar and Levanowitz attended the meeting with Gilbert. The meeting lasted approximately 30 to 35 minutes. (Gilbert Statement ¶13.) Because Homar and his union representatives were concerned that Levanowitz's private discussions with Gilbert were possibly prejudicial to Homar, they requested that Levanowitz step out of the office during part of the meeting, which he did. (Dkt. Entry #25 at 46.) During his deposition, Pottiger affirmed that Gilbert provided Homar with a full opportunity to respond to the charges and the discipline Levanowitz imposed. (Pottiger Dep. at 22.)

By letter dated September 24, 1992, Gilbert informed Homar that it was his "decision to sustain the recommendation of Chief Marazas, Director Levanowitz, and Vice President English and your demotion stands as stated in our letter of September 23, 1992." (Plaintiff's Exhibit 16 attached to the Levanowitz Deposition (Docket Entry 26).) Grievance procedures in the collective bargaining agreement covering HOMAR's employment were then utilized to challenge Homar's demotion. Homar's collective bargaining representative was free to present evidence in support of Homar's position. The State System of Higher Education denied the grievance at Step 3 and the Commonwealth's Office of Labor Relations, Bureau of Labor Relations denied the grievance at step 4. Although the union had the right to proceed to arbitration following the denial at Step 4, it elected to withdraw the matter.

Homar filed his suit on June 7, 1993. Defendants filed an answer on September 7, 1993. Defendants subsequently filed their summary judgment motion in January of 1994. Briefing was completed in March of 1994.

This matter is ripe for disposition.

II. DISCUSSION

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment should be granted when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R.Civ. P. 56(c). Summary judgment will not lie "if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). There is no issue for trial unless sufficient evidence exists which favors the non-moving party so that a jury may return a verdict for that party. Anderson, 477 U.S. at 249-250.

A fact is "material" if proof of its existence or non-existence would affect the outcome of the lawsuit under the law applicable to the case. Id., at 248. Summary judgment thus should be entered when a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

A. Procedural Due Process

1. Property Interest

The parties do not dispute that Pennsylvania law provided Homar with a protectible property interest in his position as an ESU police officer; they instead dispute whether the process Homar received was constitutional. In that regard, both parties cite Cleveland Board of Education

v. Loudermill, 470 U.S. 532 (1985), in which the Court said:

> A tenured public employee is entitled to pretermination process consisting of oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. Id. at 544, 546 (emphasis added).[5]

Yet Homar was not terminated from the employ of ESU. He instead was temporarily suspended and then demoted. Thus, Homar is not a terminated employee as discussed in Loudermill. It is unclear whether due process protections extend to employment discipline short of termination. Since neither party has addressed the issue, however, it will be presumed that Homar had a protectible property interest in the position of ESU police officer [sic]

2. Homar's Suspension

Homar contends that he was entitled to an opportunity to be heard before he was suspended from his position as an ESU police officer. Assuming that the suspension infringed a protected property interest, it does not follow that Homar was entitled to some form of hearing before the suspension

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[5] Emphasis is added here to highlight the fact that the notice may be oral. Thus, Homar's technical argument that his rights were violated because the Defendants did not provide him with written notice of the specific allegations upon which the demotion decision was made is unavailing. See Fraternal Order of Police Lodge No. 5 v. Tucker, 868 f.2d 74, 80 n. 5 (3rd Cir. 1989). In a similar vein, Homar's technical argument that the Defendants did not provide him with a copy of the supplemental report is unavailing. (See Dkt. Entry #23 at 15.) Homar admits that he had a copy of the report at the Gilbert meeting.

was implemented. See Ceko v. Martin, 753 F.Supp. 1418, 1424 (N.D. Ill. 1990). Both the timing and the nature of the requisite process depends upon an "appropriate accommodation of the competing interests involved." Goss v. Lopez, 419 U.S. 565, 579 (1975). Those competing interests, which necessarily must be assessed in the context of the facts peculiar to each case, include "the importance of the private interest and the length and finality of the deprivation, . . . the likelihood of governmental error, . . . and the magnitude of the governmental interests involved." Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1982). See also Loudermill, 470 U.S. at 542. "An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." FDIC v. Mallen, 486 U.S. 230, 240 (1988).

In this case, the private interest was strong, but the deprivation incident to a suspension was only temporary and of a relatively brief duration (approximately one month). The likelihood of governmental error was slim in that the suspension was based on the undisputed fact that Homar had been arrested when he was found at the location where significant drug-related activities were being conducted. Thus, there was indeed "a substantial assurance that the deprivation [was] not baseless or unwarranted." Mallen, 486 U.S. at 240. Finally, the governmental interest in preserving public confidence in law enforcement was compelling.

Under similar circumstances, suspensions without a prior opportunity to be heard have withstood constitutional challenges. See, e.g., Ceko, 753 F.Supp. at 1425; Sherod v. Wahl, No. 91-7953, 1993 WL 81428 (N.D. Il. Mar. 19,

1993). Cf., Cheathon v. Brinkley, 822 F.Supp. 1241, 1245-46 (M.D.La. 1993) (defendants who immediately suspended plaintiff upon learning of his arrest for accepting bribes entitled to qualified immunity inasmuch as there was no clearly-established right to a pre-suspension opportunity to be heard).[6] As explained in Caine v. Hardy, 943 F.2d 1406, 1412 (5th Cir. 1991), "[n]ot even an informal hearing . . . must precede a deprivation undertaken to protect the public safety." See also Stana v. School District of City of Pittsburgh, 775 F.2d 122, 128 (3rd Cir. 1985) (implying that where "emergency involving the public welfare was at issue," government need not hold hearing prior to termination).

Homar was certainly charged with important law enforcement responsibilities and the preservation of public safety. His arrest on a drug-related charge implicated important governmental interests in maintaining public confidence in our law enforcement agents. Clearly, his immediate suspension upon being arrested did not violate the due process clause of the Fourteenth Amendment.[7]

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[6] The Defendants in the matter sub judice did not raise the defense of qualified immunity in their summary judgment motion, but it may be applicable here.

[7] Contrary to Homar's assertion, our Court of Appeals did not hold in Fraternal Order of Police Lodge No. 5 v. Tucker, 868 F.2d 74 (3rd Cir. 1989), that a police officer is entitled to a hearing before being suspended under any circumstances. In Tucker, the police officers in question had been "suspended with intent to dismiss," which the Third Circuit viewed as "an action . . . tantamount to dismissal." Id. at 79. Thus, the court did not address the question of the timing of a hearing for a temporary suspension as opposed to an immediate termination. Second, the police officers in that case had been "suspended with intent to dismiss" based upon an internal investigation without ever having been charged with any criminal wrongdoing. Thus, that case did not present the "substantial assurance that the deprivation is not baseless or unwarranted" that is present here. Mallen, 486 U.S. at 240. In short, Tucker did not address the question presented here--whether a police officer is entitled to an opportunity to

The fact that Homar was awarded full pay and benefits for the period of suspension also compels entry of judgment in favor of the Defendants on this claim. "Suspension with pay does not raise due process concerns." Hicks v. City of Watonga, Okl., 942 F.2d 737, 746 n.4 (10th Cir. 1991). Accord, Pitts v. Board of Educ. Of U.S.D. 305, Salina, Kansas, 869 F.2d 555, 556 (10th Cir. 1989) (suspension of public employee with pay does not infringe any measurable property interest); Watkins v. McConologue, 820 F.Supp. 70, 72 (S.D. N.Y.), aff'd mem., 978 F.2d 706 (2nd Cir. 1992)(same); Weg v. Macchiarola, 729 F.Supp. 328, 338 (S.D.N.Y. 1990) (same). Indeed, Loudermill explicitly recognized that a suspension with pay while an investigation is pursued to determine whether the employment relationship should be severed was an appropriate course of action to be taken by the employer. 470 U.S. at 545.

That Homar was originally suspended without pay does not warrant a finding that he was deprived of property without due process. At most, he was denied the use of his salary for a very brief period of time. To recognize a cause of action for denial of due process under these circumstances would clearly elevate form over substance.

In Swick v. Chicago, 11 F.3d 85, 87 (7th Cir. 1993), the court observed:

> The maxim de minimis non curat lex retains force even in constitutional cases, even in civil rights cases. Its particular function is to place

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be heard where he or she is suspended after being arrested for significant criminal activity.

> outside the scope of legal relief the sorts of intangible injuries normally small and invariably difficult to measure that must be accepted as the price of living in society rather than made a federal case out of. The injury that results when a person is temporarily deprived of his right to wear a uniform and a badge, to carry a gun, to arrest people, and to carry out other functions of a police officer or other public officer is of this character. [Emphasis added.]

Homar has not articulated any injury accruing as a result of his suspension upon being arrested for drug related charges. Since he clearly could be suspended with pay without implicating due process concerns, and within one month after being suspended he was awarded full pay for the period of suspension, any injury resulting from the failure to provide an opportunity to be heard before the suspension was imposed is surely de minimis. Accordingly, Defendants are entitled to summary judgment on the suspension claim because the alleged deprivation was de mimimis.

3. Homar's Demotion

The primary thrust of Homar's contention that he was denied due process is that his September 18th meeting with Levanowitz did not provide a meaningful pre-deprivation opportunity to respond to the charges upon which Levanowitz ultimately relied in deciding to demote him. Prior to being deprived of a property right enjoyed in a job, a public employee is entitled to a sufficient explanation of the employer's evidence to permit a meaningful response. Tucker, 868 F.2d at 80. This requirement does not mandate

that all evidence of a charge or even documentary evidence be provided to the employee; only that such descriptive explanation be afforded as to permit the employee to respond to the allegations giving rise to the dismissal. Linton v. Frederick County Bd. Of County Commissioners, 964 F.2d 1436 (4th Cir. 1992); Tucker, 868 F.2d at 80 (merely advising a discharged officer of drug use complaint did not provide opportunity to rebut the specifics of the allegations of drug use or the underlying evidence). Thus, Homar is correct that his September 18th meeting with Levanowitz did not allow him to make a meaningful response to the damaging information found in the supplemental report. Yet, the meeting with Levanowitz was not Homar's sole pre-deprivation opportunity to respond to the substance of the supplemental report.

As noted above, Homar and two union representatives acting on his behalf met with President Gilbert on September 24 at 2:00 p.m. The significance of the meeting was that Gilbert held ultimate decisionmaking authority regarding whether Homar would remain employed by ESU as a police officer or groundskeeper. The significance of the timing of the meeting was that September 24 was the date Levanowitz allowed Homar to return to work at ESU; the meeting with Gilbert occurred before Homar would have started his evening shift as a police officer should Gilbert have decided to reinstate him to that position. Thus, Homar was not deprived of any work time (or pay) as a police officer by Levanowitz's decision. Indeed, Gilbert's decision that Homar could not return to ESU as a police officer is properly viewed as the point in time when Homar was deprived of his position as an ESU police officer.

In addition to having in his possession Levanowitz's

letter which directly referred to the supplemental report, Homar obtained a copy of the report to review prior to the meeting with Gilbert. Homar thus had notice of all charges or allegations upon which Gilbert would make a decision. Homar does not contend that Gilbert did not allow him a sufficient opportunity to respond to the information found in the supplemental report during the meeting, which lasted about thirty minutes. Indeed, Homar's union vice president, who attended the meeting, acknowledged that Gilbert provided a full opportunity to respond. Moreover, reacting to concerns about Levanowitz's presence, Gilbert had Levanowitz leave the meeting to allow Homar the opportunity to influence him outside of Levanowitz's presence.

Homar contends that the meeting with Gilbert came too late. He characterizes the Gilbert session as "a post-deprivation appeal." (Docket Entry 23 at 15). Although Levanowitz had made his decision to demote Homar on September 23, 1992, that decision did not take effect until September 24, 1994 at 4:00 p.m., when Homar's shift as an ESU police officer began. Essentially, therefore, Homar is contending that he was entitled to a pre-decision opportunity to respond to the evidence that would be considered against him.

A similar argument was raised in Chung v. Park, 514 F.2d 382 (3rd Cir.) cert. denied, 423 U.S. 948 (1975). Chung, a college professor, had received a letter informing him that his position at Mansfield State College was being terminated for a number of reasons. After Chung received the termination letter, but before the termination became effective, a hearing was conducted at which Chung was allocated the burden of showing that the termination was

arbitrary, capricious or discriminatory. Our Court of Appeals, affirming the entry of judgment in favor of the defendants, ruled that "[a] pre-termination hearing is not a hearing held prior to any decision to terminate, as Dr. Chung suggests, but rather a hearing held prior to a termination of benefits." Id. at 386 n.7. Writing for the unanimous court, Judge Adams explained:

> [Dr. Chung] would have us hold that due process in the present case required that a hearing be held before any decision to terminate was reached by the administration ...
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> Due process does not impose such restrictions on professional pre-termination proceedings. Unlike some legal rules, due process is protean in nature . . .
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> * * *
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> [T]he function of the [pre-termination] hearing procedure is to inform the professor of the grounds for his non-retention and to allow him to challenge their sufficiency. [A] post-decision hearing . . . is adequate to satisfy due process. Moreover, the administration of the internal affairs of a college

> and especially the determination of professional competency is a matter peculiarly within the discretion of a college administration.
>
> Due process should not be employed to ensure that this exercise of discretion is "wise" but only that it is not unreasonable, arbitrary or capricious. If the procedure used by the college is adequate to prevent unreasonable, arbitrary or capricious termination decisions, it satisfies due process. The procedure used in this case was sufficient for these purposes. Id. at 386-87.

Accord, Bignall v. North Idaho College, 538 F.2d 243, 246 (9th Cir. 1976); Vance v. Chester County Board of School Trustees, 504 F.2d 820, 824-26 (4th Cir. 1974); Serafin v. Lexington, 547 F.Supp. 1118, 1126 n.1 (D. Neb. 1982), affirmed mem., 716 F.2d 909 (8th Cir. 1983); Keddie v. Pennsylvania State University, 412 F.Supp. 1264, 1271 (M.D. Pa. 1976).[8]

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[8] As noted above, post-demotion procedures were pursued on Homar's behalf. It has been recognized that collective bargaining agreement grievance procedures provide adequate post-deprivation process. See Wallace v. Tilley, 41 F.3d 296, 302 (7th Cir. 1994). In any event, Homar has not requested that this Court direct Defendants to conduct a belated hearing and has not otherwise challenged the adequacy of post-deprivation processes.

Chung has been followed in post-Loudermill cases. For example, in Jackson v. St. Joseph State Hospital, 840 F.2d 1387 (8th Cir. 1988), the court rejected a similar argument to that advanced here, stating:

> Jackson . . . argues that due process was violated because his termination letter indicated that the decision to terminate had already been made. All he was given was an opportunity to convince Dr. Bartulica to change his mind and rescind the termination. Jackson argues that his hearing should have preceded the decision to terminate rather than the effective date of termination.
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> Due process, however, does not require pre-decision hearings. It only requires an opportunity to be heard prior to the termination of benefits. In the present case, Jackson was given written notice of his termination on February 17, 1983. The reasons for termination were clearly set forth in this letter. Accompanying the notice were statements made by hospital employees explaining Jackson's

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challenged the adequacy of post-deprivation processes.

> inadequacies. And, more significantly, the notice stated that Jackson's termination was not effective until February 28, 1983 and until then he would continue to receive full pay....
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> From February 17 until February 28 he had the opportunity to present his case and on February 23, 1983 he made a written response to the dismissal letter. Because Jackson was given the opportunity to be heard prior to the termination of his salary, his due process rights were not violated. Id. at 1391.

Accord, Alexander v. Temple University, 1992 U.S. Dist. LEXIS 16803 *8 (E.D. Pa. 1992).

Therefore, assuming that Homar held a protectible property interest in his position as a police officer, Gilbert provided the timely process to which Homar was entitled. Homar had notice of the charges against him, he knew of the evidence Gilbert possessed, and he had an opportunity to respond. The meeting certainly did not need to be structured in any more formal manner than it was, for "[t]he pretermination hearing may be informal so long as it affords the employee an opportunity to make any 'plausible arguments that might . . . prevent [the] discharge." Tucker, 868 F.2d at 79 (quoting Loudermill, 470 U.S. at 544). See Dennison v. County of Frederick, 921 F.2d 50, 55 (4th Cir.

1990) (unscheduled performance review operated as a constitutional pre-termination hearing where employee resigned after supervisor informed employee that he would be placed on probation unless performance improved), cert. denied, 501 U.S. 1218 (1991); Buschi v. Kirven, 775 F.2d 1240 (4th Cir. 1985) (telephone call offering employee opportunity to discuss discharge satisfied pre-termination hearing requirements). Under these circumstances, it cannot be said that Homar was deprived of property in violation of the Fourteenth Amendment's Due Process Clause. Consequently, Defendants merit judgment as a matter of law with regard to this claim.[9]

4. Homar's "Liberty" Interest

Homar's Complaint alleges that the demotion to groundskeeper damaged his standing in the community and continues to stigmatize him, even though he was cleared of criminal charges. (Compl. at ¶¶33, 36.) Homar thus appears to make a claim that the Defendants violated his Fourteenth Amendment right to protection against deprivation of liberty without due process of law.

A public employee has a protectible liberty interest in

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[9] Homar also complains that his due process rights were violated because he was not entitled to have his attorney present at the September 18, 1992 meeting. It appears, however, that Levanowitz would have permitted Homar's counsel to be present provided ESU's lawyer was also in attendance, and that the meeting would have to be adjourned to accomplish that. Moreover, Homar admits that his union contract "is silent as to the right of counsel at disciplinary hearings." (Docket Entry 22 at ¶28.) Homar also does not contend that he requested that counsel be permitted to attend the meeting with Gilbert, at which Homar was represented by two union officials. In any event, due process does not mandate that a public employer permit an employee to have an attorney attend a pre-termination or pre-demotion proceeding. See Wallace v. Tilley, 41 F.3d 296, 301 (7th Cir. 1994).

receiving due process in two circumstances. First, "'[w]here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him.'" Board of Regents v. Roth, 408 U.S. 564, 573 (1972). This interest is violated when, for example, the basis for discharge without due process is that the employee had been "guilty of dishonesty or immorality" which "might seriously damage [the employee's] standing and associations in [the] community." Id. The employee, however, is entitled to due process only when these charges are publicly disclosed by the government entity. See Bishop v. Wood, 426 U.S. 341, 348-49 (1976); Codd v. Velger, 429 U.S. 624, 626-27 (1977).

The second circumstance in which a liberty interest exists, requiring due process, is when the government employer imposes "a stigma or other disability that foreclosed [the employee's] freedom to take advantage of other employment opportunities." Roth, 408 U.S. at 573-74. The effect of the stigma must be more than simply to make the employee "somewhat less attractive to some other employers" in order to amount to foreclosure of future job opportunities. Id. at n. 13.

With regard to both circumstances, Homar fails to proffer evidence "such that a reasonable jury could return a verdict" in his favor. Anderson, 477 U.S. at 248. He does not establish that the Defendants publicly disclosed the basis for his demotion. Furthermore, Homar does not establish that his demotion imposes a stigma upon him which forecloses his opportunities to find other employment. Indeed, Homar, who continued to work as an ESU groundskeeper as of the filing of his brief in opposition to Defendants' motion for summary judgment, does not contend

that he even sought other employment. Consequently, Defendants are entitled to judgment on Homar's claim that his "liberty interests" were infringed without due process. See Loudermill, 740 U.S. at 547 n.13; Watkins, 820 F.Supp. at 72; Weg, 729 F.Supp. at 339.

B. Substantive Due Process

Homar and Defendants concur that "[a] violation of substantive due process rights is proven: (1) if the government's actions were not rationally related to a legitimate government interest; or (2) if the government's actions in a particular case were in fact motivated by bias, bad faith or improper motive." Parkway Garage v. Philadelphia, 5 F.3d 685, 692 (3rd Cir. 1993). Homar does not contend that his demotion was not rationally related to a legitimate government interest. Instead, he contends that the record supports a finding of bias, bad faith or improper motive.

The only evidence proffered by Homar on this issue concerns the actions of Levanowitz. The final decision to demote Homar, however, was made by ESU President Gilbert. Homar does not suggest any bias, bad faith or improper motive on the part of Gilbert.

Moreover, the evidence relating to Levanowitz is not sufficient to submit the question of bias, bad faith or improper motive to a jury. For example, Homar contends that evidence of bad faith is shown by his suspension without prior notice or opportunity for a hearing; but as noted above, Homar's arrest on drug-related charges provided ample basis for his suspension without any hearing. Homar also contends that after the charges against him were dismissed

made known to Homar prior to his September 18, 1993 meeting with Leanowitz. There is nothing improper about conducting an investigation of a law enforcement officer who has been arrested, even if the charges are ultimately dismissed. Nor would it seem to have been imprudent to poll members of the police department on this issue. And the information on which the demotion decision was premised was disclosed to Homar before his meeting with the University President. Homar also contends that inappropriate conduct is revealed by Levanowitz' statement that Homar did not have a right to legal counsel at the September 18, 1992 [sic] meeting. Not only does it appear that Levanowitz' advice was correct, but it also appears that Levanowitz was willing to postpone the meeting so that both sides could be represented by counsel. No inference of bias, bad faith or improper motive can be discerned from such conduct. Accordingly, Defendants are entitled to summary judgment on Homar's substantive due process claim.

An appropriate Order is attached.[10]

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[10] Paragraph 39 of Homar's Complaint regards the alleged denial of unspecified procedural guarantees set forth in the Pennsylvania state constitution. Inasmuch as Homar may intend to assert a pendent state law claim, Pennsylvania retains its sovereign immunity, 1 Pa. C.S. §2310; Toombs v. Manning, 835 F.2d 453, 457-60 (3rd Cir. 1987), which also shields the Defendants. Poliskiewicz v. East Stroudsburg University, 113 Pa.Cmwlth. 13, 17, 536 A.2d 472, 474 (1988) (ESU is Commonwealth for purposes of sovereign immunity). See also Shoop v. Dauphin County, 766 F.Supp. 1327, 1334 (M.D. Pa.) (Rambo, J.) (1 Pa. C.S. § 2310 also protects Commonwealth employees and officials), aff'd mem., 945 F.2d 396 (3rd Cir. 1991), cert. den., 112 S.Ct. 1178 (1992).

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD J. HOMAR,	:	
	:	
Plaintiff	:	
	:	**CV-93-0852**
v.	:	
	:	**JUDGE VANASKIE**
JAMES E. GILBERT, et al.,	:	
	:	
Defendants	:	

ORDER

NOW, THIS 17th DAY OF MARCH, 1995, for the reasons set forth in the accompanying Memorandum, **IT IS HEREBY ORDERED THAT:**

1. Defendants' Motion for Summary Judgment (Docket Entry #19 is **GRANTED**.

2. The Clerk of Court is directed to enter judgment in favor of Defendants.

3. The Clerk of Court is directed to close this case file.

Thomas I. Vanaskie
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

JUDGMENT IN A CIVIL CASE

RICHARD J. HOMAR

vs.

Case Number:
3:CV-93-0852

JAMES E. GILBERT, Individually and in his capacity as Pres. of E.S. Univ., GERALD LEVANOWITZ Individually and in his capacity as Director of Human Res. Of E.S. Univ., DAVID MARAZAS, Individually and in his capacity as Police Chief of E.S. Univ., And CURTIS ENGLISH, Individually and in his capacity as V.P. of E.S. Univ.

IT IS ORDERED AND ADJUDGED that judgment be and is hereby entered in favor of the defendants, James E. Gilbert, Gerald Levanowitz, David Marazas, and Curtis English, and against plaintiff Richard J. Homar.

March 17, 1996
DATE

MARY E. D'ANDREA
CLERK

JOSEPH F. GAUGHAN
DEPUTY CLERK